



Immigration-Related Worksite Enforcement: Performance Measures

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Summary

In the spring of 2009, the Department of Homeland Security (DHS) issued new guidance on immigration-related worksite enforcement. In the words of DHS, the updated guidance “reflects a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country’s laws and knowingly hiring illegal workers.” Under the guidelines, DHS “will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.” According to 2008 estimates, there are some 8.3 million unauthorized workers in the U.S. civilian labor force.

DHS’s U.S. Immigration and Customs Enforcement (ICE) is responsible for immigration-related worksite enforcement, or enforcement of the prohibitions on unauthorized employment in Section 274A of the Immigration and Nationality Act (INA). The INA §274A provisions, sometimes referred to as employer sanctions, make it unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. Today, ICE’s worksite enforcement program is focused primarily on cases that involve critical infrastructure facilities and cases involving employers who commit “egregious violations” of criminal statutes and engage in worker exploitation.

Employers who violate INA prohibitions on the unlawful employment of aliens may be subject to civil monetary penalties and/or criminal penalties. Criminal investigations may result in defendants being charged with crimes beyond unlawful employment and being subject to the relevant penalties for those violations.

Various measures are available to examine the performance of ICE’s worksite enforcement program. They include Final Orders for civil monetary penalties, administrative fines, administrative arrests, criminal arrests, criminal indictments and convictions, and criminal fines and forfeitures. In addition to examining annual changes and trends in the various performance measure data, these data can be considered in relation to the estimated size of the unauthorized workforce or the potential number of employers employing these workers. When considered in this context, ICE’s worksite enforcement program can seem quite limited.

Enforcement activity by the Department of Labor (DOL) is also relevant to a discussion of federal efforts to curtail unauthorized employment. DOL, which is responsible for enforcing minimum wage, overtime pay, and related requirements, focuses a significant percentage of its enforcement resources on a group of low-wage industries that employ large numbers of immigrant—and presumably large numbers of unauthorized—workers.

Related background information can be found in CRS Report RL33973, *Unauthorized Employment in the United States: Issues, Options, and Legislation*. This report will be updated when new data become available.

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Introduction

In the spring of 2009, the Department of Homeland Security (DHS) issued new guidance on immigration-related worksite enforcement—the enforcement of prohibitions on the employment of unauthorized aliens in the United States. In the words of DHS, the updated guidance “reflects a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country’s laws and knowingly hiring illegal workers.”¹ According to 2008 estimates, there are some 8.3 million unauthorized workers in the U.S. civilian workforce.²

Questions arise as to how rigorous and effective DHS’s worksite enforcement efforts have been under the Obama Administration and in past years. The department maintains data on several measures that can be used to examine the performance of its worksite enforcement program. Enforcement activity by the Department of Labor (DOL) is also relevant to a discussion of federal efforts to address unauthorized employment. DOL, which is responsible for enforcing minimum wage, overtime pay, and related requirements, focuses a significant percentage of its enforcement resources on a group of low-wage industries that employ large numbers of immigrant—and presumably large numbers of unauthorized—workers.

Unauthorized Workers

According to the most recent estimates by DHS, some 10.8 million unauthorized immigrants were living in the United States in January 2009.³ The Pew Hispanic Center’s (the Center) unauthorized alien population estimate for March 2008 was 11.9 million.⁴ It is widely believed that most unauthorized aliens enter and remain in the United States in order to work.

The Center has estimated that there were 8.3 million unauthorized workers in the U.S. civilian labor force in March 2008, representing four of every five unauthorized adults in the United States at that time. These unauthorized workers accounted for about 5% of the civilian labor force. In its analysis, the Center found that the unauthorized alien share of the labor force in some occupations and industries was considerably higher than its 5% overall share.⁵ **Table 1** presents 2008 data from the Pew Hispanic Center on industries with relatively high concentrations of unauthorized workers.

¹ U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, “Worksite Enforcement Overview,” fact sheet, April 30, 2009.

² Jeffrey S. Passel and D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center, April 14, 2009 (hereafter cited as Passel and Cohn, *A Portrait of Unauthorized Immigrants*, 2009).

³ U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009*, by Michael Hofer, Nancy Rytina, and Bryan C. Baker, September 2008.

⁴ Jeffrey S. Passel and D’Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, Pew Hispanic Center, October 2, 2008.

⁵ Passel and Cohn, *A Portrait of Unauthorized Immigrants*, 2009, pp. 12-16.

Table 1. Estimates of Unauthorized Employment in Selected Industries, 2008

Industry Group	Unauthorized Workers (in Industry)
Construction	14%
Agriculture	13%
Leisure & Hospitality	10%
Professional & Business Services	7%
Manufacturing	7%

Source: Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center, April 14, 2009.

DHS Enforcement

Section 274A of the Immigration and Nationality Act (INA)⁶ prohibits employers from employing individuals who they know are not authorized to work. More specifically, the INA §274A provisions, sometimes referred to as *employer sanctions*, make it unlawful for an employer to knowingly hire, recruit or refer for a fee, or continue to employ an alien who is not authorized to be so employed. These provisions also make it unlawful for an employer to hire an individual for employment without examining documents to verify the new hire's identity and work eligibility, and completing and retaining verification forms, known as I-9 forms. These verification procedures, commonly referred to as the I-9 process or the I-9 requirements, are separate from the largely voluntary E-Verify electronic employment eligibility verification system, which is administered by DHS's U.S. Citizenship and Immigration Services (USCIS).⁷

Enforcement of the prohibitions on unauthorized employment in INA §274A—or *worksite enforcement*—has been the job of DHS's U.S. Immigration and Customs Enforcement (ICE) since 2003.⁸ Worksite enforcement is one component of ICE's responsibility to enforce federal immigration laws within the United States, known as *interior enforcement*. Employers violating the INA §274A prohibitions on unlawful employment may be subject to civil and/or criminal penalties.

The federal government's approach to immigration-related worksite enforcement has changed over the years. In 1999, for example, the Immigration and Naturalization Service (INS) unveiled an interior enforcement strategy, which, as explained by an INS official at the time, gave priority in the area of worksite enforcement to two types of cases: (1) criminal employer cases, in which there was a pattern or practice of knowingly employing unauthorized workers, and (2) cases of employers who abused their workers and who violated multiple laws.⁹ In the aftermath of the

⁶ Act of June 27, 1952, ch. 477, as amended. The INA is the basis of current immigration law.

⁷ For information on E-Verify, see CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno. For related legislation in the 111th Congress, see CRS Report R40848, *Immigration Legislation and Issues in the 111th Congress*, coordinated by Andorra Bruno.

⁸ Prior to March 1, 2003, the Immigration and Naturalization Service (INS) of the Department of Justice was responsible for interior enforcement. The Homeland Security Act of 2002 (P.L. 107-296, November 25, 2002) abolished INS and transferred most of its functions to DHS as of March 1, 2003.

⁹ See written statement of Robert Bach, Executive Associate Commissioner for Policy and Planning, INS, in U.S. (continued...)

September 11, 2001, terrorist attacks, interior enforcement priorities again shifted. Resources were redirected from traditional program areas, including worksite enforcement, to national security-related investigations, and the primary focus of worksite enforcement became removal of unauthorized workers from critical infrastructure facilities such as airports and military bases.¹⁰

Homeland security remains a primary concern of ICE's worksite enforcement program today. As described by ICE:

The Worksite Enforcement Unit's mission encompasses enforcement activities intended to mitigate the risk of terrorist attacks posed by unauthorized workers employed in secure areas of our nation's critical infrastructure.¹¹

In addition, according to ICE, "worksite enforcement investigations often involve egregious violations of criminal statutes by employers and widespread abuses." These cases also may involve additional violations, such as alien smuggling, document fraud, and worker exploitation.¹²

In written testimony for a 2009 Senate Judiciary Committee hearing, DHS Secretary Janet Napolitano described ICE's approach to worksite enforcement under the new guidance issued in April 2009:

ICE will focus its resources within the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration. ICE will continue to arrest and process for removal any illegal workers who are found in the course of these worksite enforcement actions in a manner consistent with immigration law and DHS priorities. Furthermore, ICE will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.¹³

In July 2009, as part of its new worksite enforcement strategy, ICE announced it was launching a new initiative to increase inspections, or audits, of business owners' I-9 records (see above) "to determine whether or not they are complying with employment eligibility verification laws and regulations." According to ICE, "inspections are one of the most powerful tools the federal government has to enforce employment and immigration laws."¹⁴

(...continued)

Congress, House Committee on the Judiciary, Subcommittee on Immigration and Claims, *Immigration and Naturalization Service's Interior Enforcement Strategy*, 106th Cong., 1st sess., July 1, 1999 (Washington: GPO, 2000), p. 13.

¹⁰ For further discussion of these policy shifts, see archived CRS Report RL33351, *Immigration Enforcement Within the United States*, coordinated by Alison Siskin.

¹¹ See description of the ICE worksite enforcement program on the agency's website, at <http://www.ice.gov>.

¹² *Ibid.*

¹³ Written statement of DHS Secretary Janet Napolitano for U.S. Congress, Senate Judiciary Committee, *Oversight of the Department of Homeland Security*, hearing, 111th Cong., 1st sess., May 6, 2009 (hereafter cited as Written statement of DHS Secretary Janet Napolitano, May 6, 2009).

¹⁴ U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, "652 Businesses Nationwide Being Served with Audit Notices Today," news release, July 1, 2009. According to the news release, ICE was issuing Notices of Inspection (NOIs) to 652 businesses nationwide, which had been selected "for inspection as a result of leads and information obtained through other investigative means."

Penalties

As discussed above, employers who violate INA prohibitions on the unlawful employment of aliens may be subject to civil and/or criminal penalties.

Civil Penalties

Under INA §274A, civil money penalties can be imposed for failing to comply with the I-9 employment verification requirements and for knowingly hiring, recruiting or referring for a fee, or continuing to employ an unauthorized alien.¹⁵ A person or entity determined to have violated the I-9 requirements may be subject to a fine of not less than \$110 and not more than \$1,100 for each individual with respect to whom a violation occurred. A person or entity found to have engaged in hiring, recruiting, referring, or employing violations may be subject to a cease and desist order and to fines, as follows:

- for a first offense, not less than \$275 and not more than \$2,200 for each unauthorized alien with respect to whom the offense occurred before March 27, 2008, and not less than \$375 and not more than \$3,200 for each unauthorized alien with respect to whom the offense occurred on or after March 27, 2008;
- for a second offense, not less than \$2,200 and not more than \$5,500 for each unauthorized alien with respect to whom the offense occurred before March 27, 2008, and not less than \$3,200 and not more than \$6,500 for each unauthorized alien with respect to whom the offense occurred on or after March 27, 2008; and
- for more than two offenses, not less than \$3,300 and not more than \$11,000 for each unauthorized alien with respect to whom the third or later offense occurred before March 27, 2008, and not less than \$4,300 and not more than \$16,000 for each unauthorized alien with respect to whom the third or subsequent offense occurred on or after March 27, 2008.

If ICE believes that an employer has committed a civil violation, the agency may issue the employer a Notice of Intent to Fine (NIF). A NIF may result in a Final Order for civil money penalties, a settlement, or a dismissal.

Criminal Penalties

Under INA §274A, employers convicted of having engaged in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens may face criminal fines and/or imprisonment. They may be fined not more than \$3,000 for each unauthorized alien with respect to whom the violation occurred and/or imprisoned for not more than six months for the entire pattern or practice.

Criminal investigations may result in employers and other individuals being charged with crimes other than unlawful employment, such as document fraud or harboring unauthorized aliens, and being subject to the relevant penalties for those violations.

¹⁵ Current fine amounts are set forth in 8 C.F.R. §274a.10. They reflect increases that took effect in 1999 and 2008 pursuant to the Debt Collection Improvement Act of 1996 (in P.L. 104-134, April 26, 1996).

Program Performance

A variety of measures can be used to assess the performance of the DHS worksite enforcement program. Over the years, such assessments have been complicated by data reporting problems, the existence of conflicting data, and other issues. Unless otherwise noted, all data presented here were provided directly to the Congressional Research Service (CRS) by ICE. The paucity of comparable and/or reliable data for the pre-ICE worksite enforcement program, as indicated by ICE to CRS, however, limits the ability to place the recent performance data in historical context.

Administrative Fines

As discussed above, INA §274A establishes civil penalties for violations of the I-9 requirements and for unlawful employment. **Table 2** provides annual data on Final Orders for civil money penalties (also known as *civil or administrative fines*) and administrative fine collections¹⁶ for FY2003 through FY2009.¹⁷

As shown in **Table 2**, Final Order issuances and administrative fine collections decreased from FY2003 to FY2006, when both measures equaled “0.” Since FY2006, both measures have posted gains. These data reflect changes over the years in the use of administrative fines as an enforcement tool. As noted above, the new DHS guidance on worksite enforcement makes reference to using civil fines. In written testimony for a 2009 House hearing, Marcy Forman, the director of the ICE Office of Investigations, discussed ICE’s renewed focus on civil fines:

In crafting our worksite enforcement strategy, ICE has restructured the worksite administrative fine process to build a more vigorous program. ICE has established and distributed to all field offices guidance about the issuance of administrative fines and standardized criteria for the imposition of such fines. We expect that the increased use of the administrative fines process will result in meaningful penalties for those who engage in the employment of unauthorized workers.¹⁸

Despite the increases in recent years, however, the number of Final Orders for civil money penalties remains very low relative to the number of U.S. employers. Employers receiving Final Orders in any year shown in **Table 2** represent less than .001% of U.S. employers.¹⁹

¹⁶ Some employers are on payment schedules that enable them to pay civil money penalties over a number of years.

¹⁷ An e-mail from the ICE Office of Congressional Relations to CRS, July 1, 2008, stated that ICE is unable to provide data on Final Orders and fine collections prior to FY2003 “due to system constraints and the merger of INS and Customs during FY03.” According to data confirmed by ICE in 2008, however, there were between 500 and 1,100 Final Orders for civil money penalties issued each year from FY1991 to FY1998, between 200 and 350 Final Orders issued each year from FY1999 to FY2001, and 91 Final Orders issued in FY2002. E-mail from the ICE Office of Congressional Relations to CRS, February 21, 2008.

¹⁸ Written statement of Marcy M. Forman for U.S. Congress, House Appropriations Committee, Subcommittee on Homeland Security, *Priorities Enforcing Immigration Law*, hearing, 111th Congress, 1st sess., April 2, 2009. For a contrary view about the usefulness of administrative fines, see written statement of ICE official Matthew Allen, in U.S. Congress, House Committee on Government Reform, Subcommittee on Regulatory Affairs, *Is the Federal Government Doing All It Can to Stem the Tide of Illegal Immigration?* hearing, 109th Congress, 2nd sess., July 25, 2006 (Washington: GPO, 2007), pp. 43-53.

¹⁹ According to the U.S. Census Bureau’s Statistics of U.S. Businesses (SUSB), there were 6.02 million firms in the United States in 2006. SUSB data are available on the Census Bureau’s website, at <http://www.census.gov>.

Table 2. Final Orders and Administrative Fine Collections, FY2003-FY2009

Fiscal Year	Number of Final Orders Issued	Administrative Fines Collected
2003	52	\$267,480
2004	10	\$87,946
2005	10	\$27,547
2006	0	\$0
2007	2	\$26,560
2008	18	\$470,146
2009	52	\$772,219

Source: CRS presentation of data from U.S. Department of Homeland Security, Immigration and Customs Enforcement, July 1, 2008 (FY2003-FY2007) and April 22, 2010 (FY2008-FY2009).

Note: Administrative fines may be collected in the same fiscal year that the associated final order is issued, or in one or more subsequent years.

Administrative and Criminal Arrests

Administrative and criminal arrests are other measures of worksite enforcement activity. Administrative arrests are for civil violations of the INA, such as being illegally present in the United States. Only a noncitizen can be the subject of an administrative arrest, which represents an initial step in the process of removing an alien from the United States. It seems reasonable to assume that most individuals arrested on administrative charges are non-managerial employees. Criminal arrests include arrests for illegal hiring as well as for identity theft, alien harboring, money laundering, and other criminal violations. Citizens and noncitizens can be the subject of criminal arrests, as can non-managerial employees, managerial employees, and employers.

Table 3. Administrative and Criminal Arrests in Worksite Enforcement Operations, FY2003-FY2009

Fiscal Year	Number of Individuals Arrested on Administrative Charges	Number of Individuals Arrested on Criminal Charges
2003	445	72
2004	685	165
2005	1,116	176
2006	3,667	716
2007	4,077	863
2008	5,184	1,103
2009	1,647	444

Sources: CRS presentation of data from written statement of the Honorable Michael Chertoff, Secretary, U.S. Department of Homeland Security, for the U.S. Senate Judiciary Committee, February 28, 2007 (FY2003-FY2004); and from Department of Homeland Security, Immigration and Customs Enforcement, July 1, 2008 (FY2005-FY2007), and April 22, 2010 (FY2008-FY2009).

Note: The same individual may be the subject of an administrative arrest and a criminal arrest; thus, there may be double counting of some individuals.

During each year from FY2003 to FY2008, as shown in **Table 3**, the number of administrative and criminal arrests in worksite enforcement operations increased; some of the yearly changes, as from FY2005 to FY2006, were marked. In 2008 congressional testimony, DHS Secretary Michael Chertoff highlighted the number of administrative and criminal arrests in worksite enforcement operations in FY2007 as evidence of the progress being made by ICE on the worksite enforcement front.²⁰

Between FY2008 and FY2009, as indicated in **Table 3**, the number of administrative arrests decreased by more than 65% and the number of criminal arrests decreased by almost 60%. The reasons for these drops are unclear. It may be that they reflect, to some degree, ICE's stated renewed focus on employers.

ICE worksite enforcement arrest statistics for FY2009 contain employment position titles for most individuals who were arrested on administrative or criminal charges.²¹ Of the total 1,647 administrative arrests that year, employment position information is available for 1,153 individuals. Non-managerial employees accounted for 1,112 of these 1,153 arrests (96%), while individuals with position titles that included owner, manager, and corporate official accounted for the remaining 41 arrests (4%).

With respect to FY2009 worksite enforcement criminal arrests, employment position information is available for 403 of the 444 individuals arrested on criminal charges. These 403 individuals included 289 non-managerial employees (72%) and 114 individuals with position titles that included owner, manager, and corporate official (28%).²² By comparison, according to ICE, there were 135 criminal arrests of employers (including owners, managers, and corporate officials) in FY2008. This apparent drop in criminal arrests of employers between FY2008 and FY2009 seems at odds with ICE's stated focus in the worksite enforcement area on "employers who cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers."²³

These administrative and criminal arrests represent a very small percentage of the potential population of violators. For example, **Table 3** shows a high of 5,184 administrative arrests in worksite operations in FY2008. That year, according to the Pew Hispanic Center, there were an estimated 8.3 million unauthorized aliens in the U.S. civilian labor force.²⁴ With respect to criminal arrests, the potential population of employers and workers committing worksite-related criminal violations is not known.

²⁰ See written statement of DHS Secretary Michael Chertoff for U.S. Congress. Senate Committee on the Judiciary, *Homeland Security Oversight*, hearing, 110th Cong., 2nd sess., April 2, 2008.

²¹ ICE worksite enforcement arrest statistics grouped by position for FY2009 provided by ICE Office of Congressional Relations to CRS, May 27, 2010.

²² Data provided in e-mail from ICE Office of Congressional Relations to CRS, June 8, 2010. While the FY2008 and FY2009 employer criminal arrest data are roughly comparable, it should be noted that ICE had different reporting systems in the two years.

²³ Written statement of DHS Secretary Janet Napolitano, May 6, 2009.

²⁴ Passel and Cohn, *A Portrait of Unauthorized Immigrants*, 2009.

Criminal Prosecutions and Fines

Table 4 provides data on criminal prosecutions related to worksite enforcement investigations for FY2005-FY2009.²⁵ These data build on the criminal arrest data in **Table 3**. As shown in **Table 4**, the number of criminal indictments and the number of convictions rose steadily from FY2005 until FY2008 and then fell. It is difficult to draw direct conclusions from these data about the worksite enforcement program in any particular year. One reason for this is that there can be time lags between arrests, indictments, and convictions.

Table 4. Criminal Indictments and Convictions Related to Worksite Enforcement Investigations, FY2005-FY2009

Fiscal Year	Indictments	Convictions
2005	254	156
2006	411	340
2007	750	561
2008	900	908
2009	361	339

Source: CRS presentation of data from U.S. Department of Homeland Security, Immigration and Customs Enforcement, July 1, 2008 (FY2005-FY2007), and April 22, 2010 (FY2008-FY2009).

Note: A conviction may occur in the same year as the related indictment or in a subsequent year.

Table 5 provides data on criminal fines and forfeitures related to worksite enforcement investigations that were imposed in FY2003-FY2008. ICE characterizes these data as follows:

Criminal fines and forfeitures include fines imposed by a U.S. District Court as a result of a criminal conviction, seizures made by ICE and forfeited to the U.S. government, payments made to ICE in lieu of the seizure and forfeiture of real or personal property, and restitution payments made by an employer to their unauthorized alien employees as a result of labor law violations. Due to system constraints, ICE manually tracks criminal fine and forfeiture statistics.²⁶

As shown in **Table 5**, worksite enforcement-related criminal fines and forfeitures have varied dramatically during FY2003-FY2009, although they have remained well above the FY2003 level in all subsequent years. In light of the various types of fines and forfeitures (as indicated in the above description from ICE) and associated time lags, which presumably help explain the great annual variability, it may be that the total for any particular year is less significant than the fact that criminal fines and forfeitures were being pursued.

²⁵ Comparable data are not available for earlier years.

²⁶ E-mail from ICE Office of Congressional Relations to CRS, July 1, 2008.

Table 5. Criminal Fines and Forfeitures Related to Worksite Enforcement Investigations, FY2003-FY2009

Fiscal Year	Criminal Fines and Forfeitures Imposed
2003	\$37,514
2004	\$2,929,000
2005	\$15,822,100
2006	\$233,044
2007	\$31,426,443
2008	\$21,978,918
2009	\$32,578,945

Source: CRS presentation of data from U.S. Department of Homeland Security, Immigration and Customs Enforcement, July 1, 2008 (FY2003-FY2007), and April 22, 2010 (FY2008-FY2009).

In summary, the data presented here offer an available, but limited, means to examine the performance of ICE's worksite enforcement program. Some measures, namely issuances of Final Orders and administrative fine collections, follow a downward trend in the initial years included and then an upward trend in more recent years. Other measures, namely administrative arrests, criminal arrests, criminal indictments, and criminal convictions, register increases until FY2008 and then a decrease from FY2008 to FY2009. The data on criminal fines and forfeitures imposed, the remaining measure, reveal no discernible pattern. More generally, the values of the various measures for the years shown seem quite small relative to the estimated size of the unauthorized alien workforce.

DOL Enforcement

While the authority to enforce the INA employer sanctions provisions rests with DHS, INA §274A does grant DOL the authority to review I-9 verification forms (see above). Under INA §274A(b)(3), employers must make completed I-9 forms available to DOL officers for inspection. DOL has separate authority to enforce federal labor laws, including the Fair Labor Standards Act (FLSA),²⁷ which establishes minimum wage, overtime pay, youth employment, and other standards.

The Wage and Hour Division (WHD) of the DOL's Employment Standards Administration (ESA) administers and enforces the FLSA with respect to private sector workers, state and local government employees, and certain federal employees. DOL officials historically have been cautious about delving into questions of work authorization. As reported in a 2007 paper by Georgetown University's Institute for the Study of International Migration (ISIM):

Labor investigators express concern that their increased involvement in employer sanctions might impede their ability to gain the trust of illegal aliens who may be the victims of labor violations and potential witnesses against employers.²⁸

²⁷ Act of June 25, 1938, ch. 676, as amended.

²⁸ B. Lindsay Lowell, Susan F. Martin, and Micah N. Bump, *Worksite Solutions to Unauthorized Migration*, Institute (continued...)

A memorandum of understanding between DOL and DHS that has been in effect since 1998²⁹ describes the respective enforcement roles and responsibilities of each agency. Under the 1998 MOU, WHD investigators are to inspect employer compliance with I-9 requirements in conjunction with labor standards enforcement only in directed investigations, that is, investigations not based on complaints. According to the MOU, this limitation “is intended and will be implemented so as to avoid discouraging complaints from unauthorized workers who may be victims of labor standards violations by their employer.” During these compliance inspections, WHD investigators are not to make inquiries about workers’ immigration status and are not to issue warning notices or Notices of Intent to Fine. All suspected serious violations uncovered by WHD during these investigations are to be promptly referred to DHS.

While DOL’s direct role in immigration-related worksite enforcement is quite limited, some maintain that the agency helps reduce unauthorized employment indirectly through its enforcement of labor laws. This argument is premised on the belief that many employers who employ unauthorized aliens also violate labor laws. The 2007 ISIM paper notes that employers have different propensities to hire unauthorized workers, and describes a category of employers that “knowingly hire[s] unauthorized workers to exploit their labor.” According to the paper, “such employers may pay salaries in cash, failing to pay their share of social security taxes; and they may seek unauthorized workers because they are less likely to complain about ill treatment.”³⁰ Thus, with respect to unauthorized employment, enforcement of minimum wage, overtime, and other statutory requirements may serve as a means of reducing the economic incentives to hire unauthorized workers and thus result in decreased demand for these workers.

Some other observers, such as former WHD Administrator Maria Echaveste, however, point out the limitations of using labor law enforcement to address unauthorized employment. They argue that many employers who hire unauthorized immigrants do not violate wage and hour laws. According to Echaveste:

I know firsthand that many employers who comply with other labor standards still hire the undocumented. Many businesses pay the minimum wage and have barely tolerable working conditions because there are sufficient undocumented workers willing to accept those terms. If we care about low-income workers in this country, we need to create pressure to improve their economic condition by reducing the supply of unauthorized workers.³¹

To the extent that some employers of unauthorized aliens violate labor standards, WHD’s compliance activities in low-wage industries may be particularly relevant to efforts to reduce unauthorized employment. In FY2008, WHD devoted about 35% of its enforcement hours to investigations in the nine low-wage industries in **Table 6**. These industries presumably employ significant numbers of unauthorized aliens (see **Table 1**). In FY2008, as indicated in **Table 6**, WHD collected \$57.5 million in back wages for FLSA overtime and minimum wage violations for about 77,000 workers. Top industries in terms of both the amount of back wages collected and the number of employees receiving back wages were restaurants, health care, and guard services.

(...continued)

for the Study of International Migration, Georgetown University, October 2007, p. 12 (hereafter cited as *Worksite Solutions to Unauthorized Migration*).

²⁹ The MOU was originally signed by ESA and the Immigration and Naturalization Service of the Department of Justice. It is available in *Interpreter Releases*, vol. 75, no. 47 (December 14, 1998), pp. 1711-1721.

³⁰ *Worksite Solutions to Unauthorized Migration*, p. vi-vii.

³¹ Maria Echaveste, “Target Employers,” *American Prospect*, October 23, 2005, at <http://www.prospect.org>.

Table 6. Cases and Back Wage Collections in Low-Wage Industries: FY2008

Industry	Number of Cases	Back Wages Collected	Number of Employees Receiving Back Wages
Restaurants	3,942	\$18,917,992	23,433
Agriculture	1,600	\$2,116,712	5,397
Health Care	1,302	\$11,403,813	15,768
Hotels & Motels	875	\$2,445,094	5,034
Day Care	746	\$1,058,579	3,070
Guard Services	633	\$13,595,350	13,138
Janitorial Services	507	\$3,469,956	5,417
Garment Manufacturing	385	\$2,596,986	2,278
Temporary Help	309	\$1,945,163	3,368
Total	10,299	\$57,549,645	76,903

Source: Department of Labor, Employment Standards Administration, Wage and Hour Division.

Table 7 provides data on low-wage industry cases and back wage collections for FLSA overtime and minimum wage violations for FY2003-FY2008. As shown in **Table 7**, the number of cases in low-wage industries generally decreased between FY2003 and FY2008. Despite this general reduction in cases, however, back wage collections increased throughout the period. With respect to the number of employees receiving back wages, this number increased until 2005 and then began to decrease. In addition, when considered in the larger context of the potential number of employers in these low-wage industries that may be violating FLSA requirements with respect to unauthorized workers, or workers generally, the numbers in **Table 6** and **Table 7**, as in the ICE data tables, can seem quite small.

Table 7. Cases and Back Wage Collections in Low-Wage Industries: FY2003-FY2008

Fiscal Year	Number of Cases	Back Wages Collected	Number of Employees Receiving Back Wages
2003	12,962	\$39,595,382	80,772
2004	12,625	\$43,141,911	84,897
2005	12,468	\$45,783,743	96,511
2006	11,172	\$50,566,661	86,780
2007	11,382	\$52,722,681	86,560
2008	10,299	\$57,549,645	76,903

Source: Department of Labor, Employment Standards Administration, Wage and Hour Division.

Conclusion

It remains to be seen whether the worksite enforcement strategy unveiled by DHS in April 2009—with its focus on employers who knowingly employ unauthorized aliens—results in increases in Final Orders, administrative fines, employer arrests, criminal indictments and prosecutions, and criminal fines and prosecutions in the coming years. More broadly, it can be

argued that the ultimate test for this strategy or any other approach to worksite enforcement by DHS or DOL is whether it helps reduce the size of the unauthorized labor force in the United States.

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