IMMIGRATION REFORM FUELS EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

It was a good year for tomato farmers in Florida, and Strano Farms was short on seasonal workers. When close to one hundred workers applied for jobs, Mr. Strano hired most of them.[1] However, the documents of several applicants looked suspicious, and Strano believed these applicants were illegal.[2] Despite the various documents offered, Strano was convinced that the documents were either forged or expired.[3] Thus, he asked for additional proof of employment authorization.[4] When six of the workers were unable to provide this information, he refused to hire them.[5] Strano made the decision not to hire these workers in an effort to comply with the Immigration Reform and Control Act (IRCA), which prohibits the hiring of illegal immigrants.[6] Importantly, only one year before this incident, Strano Farms paid $100,000 in fines for *hiring* illegal workers.[7]

Nevertheless, the six workers Strano refused to hire were able to sue Strano Farms for discrimination, and, ultimately, won their lawsuit.[8] As one court explained, the fact that the employer "was performing its obligation to verify employment eligibility did not insulate it from a charge of document abuse."[9] As a result of this case, Strano and other similarly

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1. United States v. Strano Farms, 5 OCAHO 748, at 211 (1995).
2. *Id.*
3. *Id.*
4. *Id.* at 212.
5. *Id.* at 211.
6. Immigration Reform and Control Act, 8 U.S.C. § 1324a(1) (2000).
7. *Strano Farms*, 5 OCAHO 748, at 211.
8. Strano v. DOJ, 98 F.3d 1351, 1353 (11th Cir. 1996) (unpublished table decision) (affirming the lower court's damages award against Strano Farms).
9. Getahun v. Office of Chief Admin. Hearing Officer, 124 F.3d 591, 596 (3d Cir. 1997).

situated employers may now fear that, by complying with IRCA's document verification requirements, they may be engaging in discrimination by committing "document abuse."[10] Like many employers in the United States, Strano is a victim of the direct conflict between the IRCA's antidiscrimination and document verification provisions. On one hand, employers must verify employment eligibility, on the other, they face discrimination lawsuits if they check documents too diligently.

This Article addresses the tension between two conflicting IRCA provisions: 8 U.S.C. § 1324a, which authorizes sanctions for hiring illegal immigrants,[11] and 8 U.S.C. § 1324b, which provides that employers cannot ask foreign job applicants for proof of work authorization beyond what is specified on the I-9 form.[12]

Part I of this Article puts in historical context the progression of the IRCA, from its enactment in 1986 to its codification, subsequent amendments, and the recent developments in this area. This progression is characterized by two conflicting goals: to prevent illegal immigration and to stop discrimination against foreigners. Part II addresses the factors that create tension between the fields of immigration and employment law by forcing employers to find a middle ground between the two conflicting provisions. Currently, employers face liability in the form of penalties, sanctions, criminal convictions, and damages awards—all of which raise the cost of doing business and increase the pressure not to hire foreign workers. Part III analyzes how small businesses, agricultural groups, and labor unions can influence the current debate over immigration reform and ensure that Congress resolves inconsistent IRCA provisions in their favor. Part IV discusses current legislative efforts to minimize the noted imperfections in the IRCA. Part V lays out a critical analysis of three current legislative proposals—all of which fail to resolve the tensions in the IRCA provisions—and offers an alternative proposal which would make it possible for U.S. employers both to comply with document verification requirements and to provide equal job opportunities for U.S. and foreign workers.

II. IMMIGRATION REFORM AND CONTROL ACT

Since the 1980s, the ultimate goal of Congress has been to curtail

10. *See Strano Farms*, 5 OCAHO 748, at 211.
11. 8 U.S.C. § 1324a.
12. *Id.* § 1324b.

illegal immigration.[13] Each year the flow of illegal immigrants into the United States has rapidly increased.[14] Various laws and regulations have been passed to address this problem. Because most illegal immigrants come to the United States to seek jobs, Congress eventually decided to control illegal immigration through the labor market.[15] As a result, many employers—facing fines and imprisonment for hiring illegal aliens—have chosen to discriminate against foreign job applicants in order to avoid potentially more serious problems with the government regulations.[16] Therefore, the IRCA provisions present a conflict between its antidiscrimination and document verification provisions.

A. *History and Recent Developments*

Congress passed the Immigration Reform and Control Act in 1986.[17] Because the majority of illegal immigrants came to the United States to seek higher-paying jobs, Congress sought to eliminate the "job magnet" by prohibiting employment of illegal aliens.[18] Thus, the IRCA was enacted in response to widespread concern that illegal aliens deprived U.S. workers of jobs,[19] and its primary goal was to "reduce and deter undocumented immigration" by relying on employer sanctions.[20]

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13. *See* Christopher Ho & Jennifer C. Chang, *Drawing the Line After* Hoffman Plastic Compounds, Inc. v. NLRB*: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 481 (2005) (stating there was widespread concern that illegal immigrants would deprive legitimate workers of jobs).

14. According to a report by the Pew Hispanic Center, in 2004 American businesses employed about seven million illegal workers—approximately 5% of U.S. workers. JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 4 (2005), http://pewhispanic.org/files/reports/44.pdf.

15. *See* Arístides Díaz-Pedrosa, Note, *A Tale of Competing Policies: The Creation of Havens for Illegal Immigrants and the Black Market Economy in the European Union*, 37 CORNELL INT'L L.J. 431, 453–54 (2004) (stating that the purpose of the IRCA was to hinder illegal immigration through the job market).

16. *See id.* at 454 & nn.183–84 (describing penalties to which employers are subjected to for violating the IRCA).

17. Immigration Reform and Control Act, 8 U.S.C. §§ 1101–1537 (2000) (also known as the Immigration and Nationality Act (INA)).

18. Díaz-Pedrosa, *supra* note 15, at 453.

19. Ho & Chang, *supra* note 13, at 481. However, the authors also point out that these concerns may not be supported empirically. *Id.* at n.31 (stating that immigrants commonly perform those jobs not taken by citizens which may not substantially impact the employment of American workers).

20. 131 CONG. REC. 21, 28708 (1985) (statement of Sen. Garcia).

As the Supreme Court pointed out in *Hoffman Plastic Compounds, Inc. v. NLRB*, the "IRCA 'forcefully' made combating '[t]he employment of illegal aliens central to the policy of immigration law.'"[21] By requiring employers to verify the employment eligibility of all prospective job applicants, the IRCA has shifted the policing burden onto employers.[22] Simultaneously, the IRCA sanctions created a risk that many employers would overreact by refusing to hire foreigners or would only hire those workers who are U.S. citizens.[23] As a result, Congress became overwhelmingly concerned that individuals who "looked or sounded foreign" would be subjected to discrimination.[24]

Congress tried to address this problem by explicitly prohibiting discrimination by employers.[25] However, this did not resolve growing discrimination concerns. Instead, the IRCA caused an overwhelming number of employers to play it safe by turning down qualified foreign job applicants.[26] Some employers stopped hiring foreigners altogether, feeling that compliance with the IRCA verification provisions was too burdensome, while at the same time, being concerned that the sanctions for noncompliance were too harsh.[27] Other employers engaged in document abuse by rejecting acceptable documents or by requiring foreign applicants

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21. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (quoting INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 & n.8 (1991)).

22. *See* Díaz-Pedrosa, *supra* note 15, at 453–54 & nn.182–83.

23. *Cf. id.* at 454 & n.184 (describing the penalties employers face for violating the IRCA mandates).

24. Andrew M. Strojny, *IRCA's Antidiscrimination Provision—How It Works and Can It Be Used to Combat Anti-Immigrant Fears?*, *in* 2 1998–99 IMMIGRATION & NATIONALITY LAW HANDBOOK 379, 381 (R. Patrick Murphy ed., 1998) (internal quotation marks omitted).

25. 8 U.S.C. § 1324b(a)(1) (2000).

26. Cynthia Bansak & Steven Raphael, *Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?*, 54 INDUS. & LAB. REL. REV. 275, 277 (2001) ("Results from the employer survey indicate that a substantial minority of employers engage in illegal discriminatory practices such as only examining the documents of applicants who are foreign-looking, or not hiring applicants with a foreign appearance . . . .").

27. *See id.* ("It is possible that employers, to hedge against the risk of being fined, statistically discriminate against workers from ethnic groups disproportionately represented among the population of undocumented workers."); Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 645 (2000) ("Not only does current immigration law impose costly and burdensome requirements on employers, there is at least some evidence that it has been ineffective in achieving its stated purpose of eliminating employment as the main attraction for illegal immigrants." (footnote omitted)).

to produce additional proof of employment eligibility.[28] As a result, Congress amended the IRCA in 1996, imposing penalties on employers who insisted upon additional or different documents than those allowed by law.[29]

Contrary to congressional intent, the 1996 amendment did not reduce illegal immigration and was only moderately successful in reducing the number of discrimination cases.[30]

According to the U.S. Bureau of Labor Statistics, there has been a continuous drop in the unemployment rate for Hispanic workers after 1996.[31] Nevertheless, the amendment did not foster a discrimination-free workplace.[32] Instead, it created a conflict between the IRCA's discrimination and verification provisions, resulted in confusion, and has left the burden on employers to make the decision as far as which IRCA provision would lead to heavier penalties if violated.[33]

B. *I-9 Employment Eligibility Verification Requirements*

When the IRCA was first enacted, it created employment eligibility verification requirements, commonly known as the "I-9 process."[34] To comply with I-9 requirements, employers must review the documents of each job applicant for authenticity and verify work eligibility.[35] If the

28. Andrew Strojny, *A Short History of Document Abuse*, FED. LAW., Sept. 1997, at 12, 12–13.

29. *See* 8 U.S.C. § 1324b(a)(6).

30. *See* Irene Zopoth Hudson & Susan Schenck, Note, *America: Land of Opportunity or Exploitation?*, 19 HOFSTRA LAB. & EMP. L.J. 351, 363–64 (2002).

31. Bureau of Labor Statistics, U.S. Dep't of Labor, *Labor Force Statistics from the Current Population Survey*, http://www.bls.gov/webapps/legacy/cpsatab3.htm (check box under "HISPANIC OR LATINO ETHNICITY" heading, "Not seasonally adjusted" column, "Unemployment rate" row in "HOUSEHOLD DATA" table A-3; then click "Retrieve data" hyperlink; then change date field from 1996 to 1995 and click "Go" hyperlink) (last visited Oct. 10, 2006). In 1995, the unemployment rate for Hispanic workers was 9.3%; it continuously dropped after 1996, reaching its lowest point of 6.4% in 1999. *Id.* Notably, there is no analysis on whether the drop was caused by the IRCA amendments or improved economic conditions.

32. *See* Bansak & Raphael, *supra* note 26, at 277 (discussing the current discrimination against foreign workers).

33. Hudson & Schenck, *supra* note 30, at 353 (noting that full enforcement of the labor policy conflicts with the purposes of the immigration policy); *see also* Dunne, *supra* note 27, at 645.

34. *See* 8 U.S.C. § 1324a(b)(1)(B) (discussing a list of documents acceptable for both employment authorization and identification purposes).

35. *See id.* § 1324a(a)(1)(A) (making it unlawful to accept a document for

documents appear to be genuine, the employer should accept them without further investigation.[36] Such requests may constitute document abuse and are punishable through fines.[37]

Therefore, when examining the documents, employers must make a reasonable determination as far as their authenticity.[38] If the documents appear to be genuine, the documents should be accepted without requiring the individual to produce other documentation.[39] Thus, the statute requires only good-faith compliance, and "[c]ompletion of the I-9 generally insulates the employer from liability, regardless of whether [the] employees are legal."[40] Moreover, there is evidence that fines for hiring illegal immigrants are infrequently imposed.[41] According to the Department of Homeland Security—the agency primarily responsible for enforcing the IRCA—the number of arrests resulting from employer investigations dropped from 17,554 in 1997 to only 445 in 2003.[42] Furthermore, from 1992 to 1998 only 235 to 799 employers were fined annually for hiring illegal immigrants.[43]

However, employers are not likely to review these statistics, which would help them realize that sanctions and penalties imposed for hiring illegal immigrants are uncommon and usually low. Instead, employers turn their attention to widely publicized examples, such as settlements between the Department of Homeland Security and Wal-Mart, which penalized

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verification purposes if there is a reason to know that the document is false or does not belong to an individual); *id.* § 1324a(b)(1)(A) (describing two categories of acceptable documents and providing that the employer is deemed to have "complied with the requirement of this paragraph with respect to examination of a document if the document *reasonably* appears on its face to be genuine") (emphasis added).

36. *Id.* § 1324b(a)(6).

37. *See id.* § 1324a(e)(5). Fines can range from $100 to $1,000 for each violation.

38. *See, e.g.*, Collins Foods Int'l, Inc. v. INS, 948 F.2d 549, 554–55 (9th Cir. 1991) (noting "that Congress intended to minimize the burden and the risk placed on the employer in the verification process[]" and also finding it unreasonable for an employer to have to compare the back of the social security card with the example in the INS handbook).

39. *See* 8 U.S.C. § 1324b(6).

40. *Developments in the Law—Jobs and Borders, Legal Protections for Illegal Workers*, 118 HARV. L. REV. 2224, 2240 (2005).

41. Ho & Chang, *supra* note 13, at 482 n.35.

42. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 157 tbl.39 (2004), http://uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf.

43. Díaz-Pedrosa, *supra* note 15, at 457.

Wal-Mart millions of dollars for hiring illegal immigrants.[44]

This lack of consistency in enforcing the IRCA verification provisions creates a fear of hiring on the part of many employers who are concerned that the government will go after them for hiring illegal immigrants, just as it went after Wal-Mart. The American "public often treats IRCA's employer sanctions provisions as a strict liability statute," believing that those who employ unauthorized workers violate the law regardless of actual knowledge.[45] Furthermore, although document abuse and I-9 violations carry similar fines,[46] failure to comply with document verification requirements may also lead to criminal penalties.[47] For instance, investigations of potential violations resulted in 159 criminal arrests in 2004.[48] As a result, the heavy fines and criminal penalties associated with the hiring of illegal workers have forced some employers to be extra careful and to request additional proof when they are in doubt of the worker's status—regardless of the legality of such action.[49]

United States v. Strano Farms is a striking example of the heavy penalties imposed for hiring illegal aliens—which amounted to over $100,000 in fines.[50] Having paid these penalties, Strano was extremely cautious the following year, and when he felt that the documents presented by the employees were either falsified or belonged to other individuals, he requested additional proof.[51] This, however, unavoidably led him to commit document abuse.[52]

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44. Janie Schulman, *Avoiding Liability for Your Contractors' Employment of Undocumented Aliens: The Lessons of Wal-Mart*, MONDAQ BUS. BRIEFING, 2005 WLNR 11444065 (July 21, 2005) ("In a recent, highly publicized settlement between Wal-Mart and the Department of Homeland Security . . . arising from the employment of undocumented workers by Wal-Mart contractors, Wal-Mart agreed to pay $11,000,000 to resolve charges that it violated the Immigration Reform and Control Act . . . .").

45. Strojny, *supra* note 24, at 381.

46. *Compare* 8 U.S.C. § 1324b(g)(2)(B) (2000), *with id.* § 1324a(e)(4) (penalties ranging from $250 to $10,000 for each violation).

47. *Id.* § 1324a(f)(1) (stating that a "pattern or practice" of hiring illegal aliens may result in up to six months in prison).

48. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2004 YEARBOOK OF IMMIGRATION STATISTICS tbl.39 (2005), http://www.uscis.gov/graphics/shared/statistics/yearbook/2004/Table39.xls.

49. *See, e.g.*, United States v. Strano Farms, 5 OCAHO 748, at 211 (1995).

50. *Id.*

51. *Id.* at 211–12.

52. *Id.* at 230.

C. *Document Abuse Provisions*

Under the IRCA, employees can demonstrate their work eligibility "by showing *any* of a number of documents that establish[] identity and authorization to work in the United States."[53] If the employer violates this provision by requiring *specific* documents, the employer may be guilty of document abuse,[54] and, importantly, the document abuse sanctions apply regardless of whether the employee was hired.[55] Furthermore, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC)—the agency responsible for enforcing the IRCA—litigates document abuse cases rather aggressively.[56]

1. *Types of Document Abuse*

Since the passage of the IRCA, courts have indicated that document abuse may occur in several ways. For example, in *Jones v. De Witt Nursing Home*, the court found that the company violated the document abuse provisions by requesting additional documents after the employee had already provided the appropriate information.[57] The employee in *De Witt* presented a social security card and a state identification card—sufficient documentation for I-9 purposes.[58] Nevertheless, the employer continued to insist that the employee show a birth certificate.[59] When the employee was unable to produce a birth certificate right away, he was fired.[60] The court, finding for the employee, noted that the two documents were redundant in that the social security card was a sufficient qualifying document and, therefore, the employer's conduct was "per se a violation of the prohibition against citizenship status discrimination."[61]

Likewise, an employer can commit document abuse by requiring specific documents from some workers while allowing other employees to provide acceptable documents of their choice, as was the case in *United*

53. Strojny, *supra* note 28, at 12 (emphasis added).

54. *See id.*

55. Strojny, *supra* note 24, at 401.

56. *Id.* at 379 (The OSC "was created to enforce IRCA's prohibition against national origin and citizenship status discrimination. OSC, which until the Spring of 1994 was an independent component within the Department of Justice, is now a part of the Department's Civil Rights Division.").

57. Jones v. De Witt Nursing Home, 1 OCAHO 189, at 1251 (1990).

58. *Id.* at 1250.

59. *Id.* at 1251.

60. *Id.* at 1241.

61. *Id.* at 1251.

States v. A. J. Bart, Inc.[62] In that case, an employer committed document abuse when it demanded that the plaintiff show a birth certificate.[63] The employer rejected the plaintiff's offer to show her social security card and a state identification card.[64] Meanwhile, the employer allowed another job applicant—in the room at the same time as the plaintiff—to tender her driver's license and social security card for I-9 verification purposes.[65] The court held that this conduct violated the IRCA's document abuse provision.[66]

Additionally, document abuse can occur when an employer demands a work authorization permit from a current employee whose permit has expired.[67] In *Camara v. Schwan's Food Manufacturing, Inc.*, an employee offered various documents issued by the USCIS (formerly the INS) indicating that he was in the United States under asylum and did not need work authorization.[68] The employer, however, refused to accept those documents and terminated the employee.[69] The court allowed the employee to proceed on his document abuse claim, reasoning that there was evidence the employer knew of his legal status.[70]

Additionally, it has also been considered discrimination for an employer to accept a greater variety of documents from U.S. citizens than from legal aliens.[71] In *United States v. Marcel Watch Corp.*, the judge explained that the employer's rejection of acceptable documents and insistence on seeing a green card constituted document abuse.[72] Although the plaintiff in this case was a Puerto Rican woman, the employer perceived her as a foreigner.[73] As a result, the employer treated her as an

62. *See* United States v. A. J. Bart, Inc., 3 OCAHO 538, at 1377, 1391 (1993).

63. *Id.* at 1391.

64. *Id.* at 1377.

65. *Id.*

66. *Id.* at 1392–93.

67. *See, e.g.*, Getahun v. Office of Chief Admin. Hearing Officer, 124 F.3d 591, 596 (3d Cir. 1997); United States v. Louis Padnos Iron & Metal Co., 3 OCAHO 414, at 181, 190 (1992).

68. Camara v. Schwan's Food Mfg., Inc., No. Civ.A. 04-121-JGW, 2005 WL 1950142, at *2 (E.D. Ky. Aug. 15, 2005).

69. *Id.* at *3.

70. *Id.*

71. Strojny, *supra* note 24, at 394 ("Requiring aliens to show certain kinds of documents to establish identity or work authorization while allowing citizens to show any documents they want to is treating people differently because of their citizenship.").

72. United States v. Marcel Watch Corp., 1 OCAHO 143, at 1003–04 (1990).

73. *See id.* at 995 (noting that the claimant screamed, "'I'm American citizen,

alien and required different documents from her than he would have required if he had believed her to be a U.S. citizen.[74]

2. *Exceptions to the IRCA Requirements*

As these cases developed, it has become increasingly clear that the 1996 amendment to the IRCA has made its provisions confusing and its requirements inconsistent.[75] As a result, several courts have struggled with having to punish employers who were merely trying to comply with the IRCA's verification requirements.[76]

When Congress considered the 1996 amendment to the IRCA, it tried to address this problem by offering some protection to employers. Specifically, the amended version of the IRCA imposes a burden upon employees to show that a request for additional documents or a refusal of legally acceptable documents was "made for the purpose or with the intent of discriminating against an individual."[77] Thus, in theory, employers requesting additional documents without intent to discriminate were now protected.[78] In practice, however, discrimination lawsuits immediately followed, leaving employers with the burden of defending their decisions and proving lack of discriminatory intent in court.[79] Therefore, although the IRCA's amendment was designed to make the statute more employer-friendly, it has resulted in requirements that, in effect, made it more plaintiff-friendly.

In addition, further protection to employers was made available through several common law and statutory exceptions to the IRCA, which either excused employers from complying with the IRCA or precluded

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I'm from Puerto Rico. I'm citizen, I don't need the ID. What kind of ID?'").

74. *See id.* at 994–95.

75. *See generally* Ho & Chang, *supra* note 13 (discussing the problems presented by the IRCA).

76. *See, e.g.*, United States v. Zabala Vineyards, 6 OCAHO 830, at 88 (1995) (refusing to find liability for document abuse where employees were asked to provide specific documents but were not denied employment or discriminated against after failing to produce the documents).

77. 8 U.S.C. § 1324b(a)(6) (2000).

78. *See* Robison Fruit Ranch, Inc. v. United States, 147 F.3d 789, 801 (9th Cir. 1998) (holding Congress intended a discrimination requirement for 8 U.S.C. § 1324b(a)(6)).

79. *See id*. at 802. This case went all the way to the Ninth Circuit, which held that the plaintiffs failed to demonstrate the employer acted with discriminatory intent in requiring all applicants to show two items of identification when a single document would have sufficed. *Id*. at 799.

discrimination claims. First, the IRCA antidiscrimination provisions do not apply to employers with three or fewer employees.[80] Second, an employer does not violate antidiscrimination provisions if citizenship status is required in order to comply with the law or the provisions of a government contract.[81] Third, a discrimination claim cannot be brought under the IRCA if a similar claim has been brought under Title VII of the Civil Rights Act.[82] Fourth, an employer can prefer a U.S. citizen over an alien with equal qualifications without risk of violating the IRCA.[83] While some employers can easily use this exception to justify their hiring decisions by saying they chose to hire an "equally qualified" U.S. applicant, many employers, such as farmers, do not have a large enough pool of applicants who are U.S. citizens. As a result, such employers cannot invoke this particular exception to the IRCA. Fifth, an employer is protected from a discrimination lawsuit if the job applicant or employee actually turned out to be an illegal alien.[84] Lastly, an employer is not liable if there was a legitimate, non-discriminatory reason for requiring additional documents or for discharging the employee.[85] However, this last exception effectively requires employers to prove their lack of discriminatory intent in court.[86]

Despite a variety of exceptions to the IRCA and the statutory intent requirement, it is very common for disgruntled employees to file document abuse lawsuits.[87] Furthermore, the current exceptions do not offer adequate protection to employers because the OSC narrowly interprets these provisions.[88] Therefore, as with most lawsuits, it is more economical

80. 8 U.S.C. § 1324b(a)(2)(A).

81. *Id.* § 1324b(a)(2)(C).

82. *Id.* § 1324b(b)(2) ("No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) of this section if a charge with respect to that practice based on the same set of facts has been filed . . . under title VII of the Civil Rights Act . . . .").

83. *Id.* § 1324b(a)(4).

84. Anica v. Wal-Mart Stores, Inc., No. 51359-1-I, 2004 WL 25288, at *7 (Wash. Ct. App., Jan. 5, 2004) (holding that the IRCA provisions were not available to the plaintiff because she was not a "protected" individual). Legal scholars are concerned that, "[b]ecause of their status as lawbreakers, . . . illegal workers are difficult for the law to protect." *Developments in the Law*, *supra* note 40, at 2224.

85. *See, e.g.*, Zamora v. Elite Logistics, Inc., 316 F. Supp. 2d 1107, 1117 (D. Kan. 2004) (noting that where a plaintiff makes a prima facie case, the defendant then bears the burden of showing "a legitimate, nondiscriminatory reason for its actions").

86. *See id.*

87. *See, e.g.*, *Anica*, 2004 WL 25288, at *7 (indicating that this case involved an illegal alien who was fired and then alleged a claim of document abuse).

88. Strojny, *supra* note 24, at 390.

for employers to settle these suits rather than expend a great deal of time and resources defending their position. As a result, many innocent employers do not receive adequate protection from the current IRCA provisions.

III. TENSIONS BETWEEN IMMIGRATION AND EMPLOYMENT LAW

The IRCA contains a conflict between its verification and antidiscrimination provisions. In essence, the employers have to choose either to commit document abuse or risk being fined for improper hiring of illegal aliens.[89] The employers who choose the second option end up paying heavy fines and spending millions of dollars in settling claims.[90] Meanwhile, more cautious employers—who ask too many questions of potential employees—face discrimination lawsuits by the job applicants and from the OSC.[91] However, the IRCA has failed to address these tensions, leaving it to the employers to deal with the consequences of these conflicting provisions.[92]

A. *Recent IRCA Employment Discrimination Cases*

1. *Enforcement by the Government*

After the IRCA's 1996 amendment, both governmental agencies and courts have focused on preventing document abuse.[93] The "OSC took an aggressive posture in enforcing the new document abuse provision."[94] The U.S. Department of Labor has made efforts to educate employers, promote fair employment practices, and inform job applicants of their rights.[95] Similarly, the Department of Justice published a handbook for foreign job applicants, discussing which employment practices constitute document

89. *See* Bansak & Raphael, *supra* note 26, at 277 (stating employers may discriminate against ethnic groups that have large numbers of illegal workers in order to avoid paying fines).

90. *See id.* at 277 n.4 (describing fines for employment violations, pattern or practice violations, and record-keeping violations).

91. *See* 8 U.S.C. §§ 1324a(e)(4), 1329a(f) (2000) (describing sanctions for hiring illegal immigrants); *id.* § 1324b(a)(6) (stating employers cannot ask employees for additional proof of work authorization).

92. *See generally id.* §§ 1324a, 1324b.

93. *See id.* § 1324(a)(6) (discussing protections offered to employers).

94. Strojny, *supra* note 24, at 397.

95. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Employer-Provided Training, http://www.bls.gov/ept/home.htm (last visited Oct. 10, 2006) (discussing the training performed to educate employers about discrimination).

abuse and discrimination.[96] The courts have followed this trend by upholding high penalties and damage awards against employers who have engaged in document abuse.[97]

As a result of these joint efforts, employers accused of engaging in document abuse pay a heavy price.[98] In addition to penalties, individual workers can sue employers for discrimination and demand backpay.[99] The OSC can also bring lawsuits on behalf of affected individuals.[100] It is, in fact, very common for the OSC to sue employers for document abuse violations.[101] There is almost no way to avoid these lawsuits, as demanding "more or different documents than necessary to establish identity and work authorization" often constitutes a per se violation, regardless of whether the employee was hired.[102] The lawsuits are often lengthy and expensive and result in bad publicity for the employers. Not surprisingly, many employers are forced to settle to avoid these consequences.[103] As a result,

96. OFFICE OF SPECIAL COUNSEL FOR IMMIGRATION-RELATED UNFAIR EMPLOYMENT PRACTICES, U.S. DEP'T OF JUSTICE, REAL LIFE STORIES THAT CAN HELP YOU, http://www.usdoj.gov/crt/osc/pdf/en_wbroc.pdf [hereinafter Office of Special Counsel].

97. *See, e.g.*, Strano v. DOJ, 98 F.3d 1351, 1353 (11th Cir. 1996) (affirming the lower court's award of $101,750 in civil penalties and $6,919 in backpay against Strano Farms in a table of Decisions Without Published Opinions).

98. 8 U.S.C. § 1324b(g)(2)(B) (2000) (indicating that penalties can range from $250 to $10,000, depending on the seriousness and pattern of violations).

99. *See, e.g.*, United States v. Strano Farms, 5 OCAHO 748, at 230 (1995) (awarding backpay to claimants).

100. Strojny, *supra* note 24, at 401.

101. *Id*.

102. *Id. But see* United States v. Zabala Vineyards, 6 OCAHO 830, at 88 (1995) (refusing to find liability for document abuse where employees were asked to provide specific documents but were not denied employment or discriminated against after they failed to produce the documents).

103. *See* Martha J. Schoonover & Jennifer M. Fenton, *Employment Authorization Regulations and I-9 Compliance*, SK078 ALI-ABA 1 at *25–26 (2005) (Westlaw)

> For example, in New Jersey an employer was charged with violating IRCA for refusing to accept a potential employee's work authorization documents and instead requiring the individual to present her naturalization papers. The settlement resulted in a cash payment by the manufacturer. In Maryland, an employer's failure to post notices of his compliance with the work verification provisions resulted in a settlement which included back pay and an agreement to post notices. National Cleaning Contractors, Inc. of Chicago also settled. The company required a potential employee to present specific work authorization documents and contacted the legacy INS to verify the individual's citizenship status; both acts, intended to verify the status of the

many document abuse discrimination cases are settled. Many are settled by the OSC,[104] which has more resources than individual plaintiffs and possesses substantial bargaining power in settlement negotiations.

2. *Enforcement by Individuals*

Employers who choose to defend their names and hiring decisions in court often pay a heavy price.[105] Lawsuits can take several years to litigate, and many take even longer on appeal. For example, the defendant in *Strano Farms* filed an appeal with the U.S. Supreme Court, which denied certiorari in 1997, more than four years after the alleged incident occurred.[106]

Unfortunately for employers, these lawsuits are often based on groundless allegations.[107] Some employers are simply harassed by disgruntled workers fired because of poor performance or their illegal status. For example, in *United States v. Zabala Vineyards*, the court finally held—after lengthy proceedings—that the employer did not engage in document abuse because the evidence showed that Mexican workers *chose* to offer immigration papers to the employer on their own initiative; the employer did not require them to do so.[108] Likewise, in *Anica v. Wal-Mart, Inc.*, the plaintiff was able to carry on a lawsuit for four years, and only then was it dismissed by the Washington Court of Appeals, which held that

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> prospective employee, violated § 274B. The employer agreed to pay back pay and post notices. A New York manufacturing company, Commodore, agreed to settle a discrimination charge. The company agreed to pay over $2,000 in back pay, post notices informing employees and hiring personnel of the IRCA anti-discrimination provisions and provide training for company personnel managers on IRCA and its anti-discrimination provisions.

Id. at *25–26 (footnotes omitted).

104. Strojny, *supra* note 24, at 402 & n.95 (noting that the threat of a large fine coupled with legal fees has encouraged settlement in many OSC actions).

105. *See, e.g.*, Strano v. DOJ, 98 F.3d 1351, 1353 (11th Cir. 1996) (affirming lower court's award of $101,750 in civil penalties and $6,919 in backpay against Strano Farms in a table of Decisions Without Published Opinions).

106. Strano v. DOJ, 521 U.S. 1103, 1103 (1997) (denying certiorari).

107. *See, e.g.*, Anica v. Wal-Mart Stores, Inc., No. 51359-1-I, 2004 WL 25288, at *7 (Wash. Ct. App. Jan. 5, 2004) (dismissing a lawsuit because the plaintiff was not a "protected" individual under the IRCA); United States v. Zabala Vineyards, 6 OCAHO 830, at 88 (1995) (finding there was no document abuse because employees themselves chose to provide documents employer suggested and employer did not condition their employment on doing so).

108. *Zabala Vineyards*, 6 OCAHO 830, at 88.

the plaintiff was not protected by the IRCA because of her illegal status.[109] Another case, *Robison Fruit Ranch, Inc. v. United States*, went all the way to the Ninth Circuit despite the fact that the basic IRCA requirement, a showing of intent to discriminate, was not present.[110]

Certainly, there are many cases that allege legitimate discrimination claims. For example, in 1997 the Third Circuit reversed the lower court's decision in *Getahun v. Office of the Chief Administrative Hearing Officer*, holding that an asylee had standing to sue for document abuse.[111] Likewise, in *Camara*, the court allowed the plaintiff to proceed with a document abuse claim upon determining that, as an asylee, he had a right to work in the United States.[112] One last example, in *Burgess v. Jaramillo*, the Texas Appellate Court affirmed a denial of a summary judgment motion filed by the government employer upon finding that engaging in document abuse did not amount to "discretionary" acts, and therefore, the employer could not claim official immunity as an affirmative defense.[113]

3. *Burden on Employers*

While some employers engage in document abuse because they misinterpret the IRCA's conflicting provisions, others do so knowingly because they are concerned about criminal penalties for hiring illegal immigrants.[114] For employers consciously engaged in document abuse, the cost-benefit analysis and added risk of imprisonment may indicate that it is more cost-efficient to violate the IRCA's document abuse provisions than to violate its document verification provisions. An inherent conflict between the discrimination and verification requirements pressures employers into having to choose the less harmful measure.[115]

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109. *Anica*, 2004 WL 25288, at *7.

110. Robison Fruit Ranch, Inc. v. United States, 147 F.3d 798, 801–02 (9th Cir. 1998).

111. Getahun v. Office of the Chief Admin. Hearing Officer, 124 F.3d 591, 592 (3d Cir. 1997).

112. Camara v. Schwan's Food Mfg., Inc., No. Civ.A. 04-121-JGW, 2005 WL 1950142, at *6 (E.D. Ky. Aug. 15, 2005). Mr. Camara alleged that his employer required him to show a work authorization permit despite the fact that those seeking asylum are not required to present such permits because they are automatically authorized to work in the United States. *See id.* at *2–3.

113. Burgess v. Jaramillo, 914 S.W.2d 246, 252 (Tex. App. 1996).

114. *See* 8 U.S.C. § 1324a(f)(1) (2000) (noting that engaging in a "pattern or practice" of hiring illegal aliens may result in up to six months in prison).

115. *See* Hudson & Schenck, *supra* note 30, at 353 (discussing how the full enforcement of the labor policy conflicts with the purposes of the immigration policy).

For example, when a Chicago company was in doubt as to the immigration status of a prospective employee, it demanded specific work authorization documents.[116] The company also "contacted the legacy INS to verify the individual's citizenship status."[117] Although the employer may have believed the applicant was an illegal alien, both acts violated the IRCA mandates.[118] When the OSC sued the company for discrimination, the employer settled and agreed to provide backpay to employees and post notices.[119] The settlement requirements were not as burdensome as the penalties the employer would have faced if the job applicant had in fact turned out to be illegal.[120]

Although discrimination is often a legitimate concern, employers are as much victims in this situation as the employees who suffer discrimination. The U.S. labor market has become a hostage of the flawed immigration law system, which requires employers to comply with conflicting provisions of the IRCA.[121] Although some employers choose the most efficient solution—resolving cases through settlements—this option is only available to those who can afford it. Therefore, statutory reform is the only viable solution that can help adequately address this conflict.

B. *IRCA Leads to Fear of Hiring*

1. *Burden to Control Illegal Immigration Lies on Employers*

As these cases demonstrate, there is an inherent conflict between the IRCA antidiscrimination and verification provisions.[122] On the one hand,

116. Schoonover & Fenton, *supra* note 103, at *25.

117. *Id.*

118. *Id.*

119. *Id.*

120. 8 U.S.C. § 1324a(e)(4) (2000) imposes civil fines that range from $250 to $10,000 for each violation. 8 U.S.C. § 1324(f)(1) imposes penalties for "a pattern or practice" of hiring illegal immigrants, ranging from a fine of not more than $3,000 or less for each unauthorized alien, to six months imprisonment, to sometimes both.

121. *See* Hudson & Schenck, *supra* note 30, at 353 (discussing how the enforcement of the labor provisions conflicts with the purposes of the immigration measures).

122. *See, e.g.*, United States v. Strano Farms, 5 OCAHO 748, at 211 (1995) (indicating that the defendant—who had previously paid fines for hiring illegal workers—later demanded to see specific documents from job applicants, and refused to hire employees whose documents he did not believe were valid; as a result, he was again fined).

employers who ask too many questions at the hiring stage may be liable for discrimination; on the other hand, they face significant penalties for hiring illegal aliens.[123] Thus, the IRCA's provisions contain a conflict that Congress and the courts have failed to resolve. Employers are torn between being sued by the government for hiring illegal workers and being sued by the job applicants whose documents are scrutinized too closely.[124]

Instead of addressing these tensions, Congress has chosen to protect employees' rights by shifting the decision-making burden to employers rather than to the regulatory agencies.[125] In effect, the United States controls illegal immigration through its labor market,[126] by forcing employers to expend their own resources to verify the legality of each job applicant. A prominent example of this mindset can be seen in the activities of the Department of Homeland Security (DHS).[127] The DHS, instead of adequately controlling illegal immigration at the border, outsources this job to employers by requiring them to control immigration at the business door.

The onion farms of southern Georgia provide "a good example of the difficulties facing employers in conducting their operations as they attempt to comply with federal immigration and other workplace laws."[128] In this sector, employers do not "have the means necessary to identify fraudulent documents, and they fear that refusing to hire available workers will violate immigration related anti-discrimination provisions."[129]

123. *Compare* 8 U.S.C. § 1324b(a)(1)(A) (prohibiting discrimination based on national origin) *with id.* § 1324a(a)(1)(A) (prohibiting employment of unauthorized aliens). *See also* Schoonover & Fenton, *supra* note 103, at *25 ("Balancing these two obligations can be burdensome to employers who are prohibited from asking for different documents or more information, but are held liable if they hire an unauthorized alien.").

124. *See* Schoonover & Fenton, *supra* note 103, at *25 ("The antidiscrimination provisions are controversial because of their inherent conflict with the sanctions imposed against employers who hire unauthorized aliens.").

125. *See* Dunne, *supra* note 27, at 644–45 (employers may assert a good faith defense to avoid liability).

126. Díaz-Pedrosa, *supra* note 15, at 454.

127. *See* Dep't of Homeland Security, Immigration & Borders, http://www.dhs.gov/dhspublic/theme_home4.jsp (last visited Oct. 10, 2006) (discussing the Secure the Border Initiative, a multi-year plan to reduce illegal migration).

128. Dunne, *supra* note 27, at 644 n.129 (citation omitted).

129. *Id.*

2. *IRCA Creates Incentive to Discriminate*

As a result of this tension, some employers are afraid to hire foreigners, while others choose an approach that can be best described as: "What you don't know can't hurt you."[130] This latter approach entails not looking beyond the face of the document—even when the document appears false—in order to avoid engaging in document abuse. Neither approach benefits workers and the U.S. economy.[131] The first approach causes underhiring of foreign workers and leads to discrimination lawsuits.[132] The second approach makes monitoring illegal workers difficult and exposes employers to penalties.[133] Ironically, as *Strano Farms* demonstrates, the heaviest penalties are imposed on diligent employers who do their best to comply with the IRCA.[134]

Despite the various IRCA exceptions, employers are now weary of foreigners, especially those whose names, accents, or appearances indicate foreign status.[135] For example, "[r]esults from the employer survey indicate that a substantial minority of employers engage in illegal discriminatory practices such as only examining the documents of applicants who are

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130. *See* Schoonover & Fenton, *supra* note 103, at *28 (suggesting that "[e]mployers should never ask job applicants to produce documentation to prove employment authorization and identity").

131. *See* 149 CONG. REC. H9897 (daily ed. Oct. 28, 2003) (statement of Rep. Bereuter):

> During Immigration and Naturalization Service (INS) enforcement raids, certain employers were found to have hired large numbers of illegal aliens, either knowingly or unintentionally, and subsequently they were subject to penalties. As technology has progressed to allow for the cheap and quick production of legitimate-looking fraudulent documents, the inability of employers to distinguish between valid documents and fraudulent documents has significantly increased. It became clear that businesses dedicated to complying with the IRCA needed new tools to assist with the endeavor.

132. *See, e.g.*, United States v. Strano Farms, 5 OCAHO 748, at 207 (1995) (detailing that migrant farm workers who were not hired claimed discrimination).

133. *See id.* at 207–08 (explaining the case of an employer charged with document abuse).

134. *See id.* at 230–31 (describing the penalties imposed on the defendant).

135. *See* Robert D. Hershey, Jr., *Bias Hits Hispanic Workers*, N.Y. TIMES, Apr. 27, 1995, at D1 (noting Hispanic workers are "finding themselves increasingly subject to intense suspicion, resentment and, in many cases, outright discrimination"); Bansak & Raphael, *supra* note 26, at 276 ("One potential consequence of sanctions is employer discrimination against authorized immigrants or native workers who look or sound foreign-born.").

foreign-looking, or not hiring applicants with a foreign appearance . . . ."[136] As a result, Hispanic and Asian workers are often discriminated against in the workplace.[137]

3. *IRCA Promotes Conflicting Policy Interests*

In addition to courts, the government also conveys a message to employers that they should fear discrimination lawsuits more than the potential sanctions for hiring illegal workers.[138] The Department of Labor and the Department of Justice websites both strongly condemn document abuse.[139] Additionally, the Office of Special Counsel for Immigration Related Unfair Employment Practices expends time and resources to go after employers who may be discriminating against foreign job applicants.[140] Meanwhile, the U.S. Citizenship and Immigration Services (USCIS) instructs employers to check the immigration status of every employee hired.[141]

In effect, each federal agency is concerned with enforcing its own policies.[142] The Department of Justice tries to discourage discrimination, the Department of Labor seeks to prevent unfair labor practices, and the USCIS strives to preserve jobs for Americans.[143] These policies

136. Bansak & Raphael, *supra* note 26, at 277.

137. *See, e.g.*, OFFICE OF SPECIAL COUNSEL, *supra* note 96 (describing actual examples of people from Korea, Vietnam, China, and Latin America who experienced discrimination).

138. *See id.* (educating foreign employees of employer actions that constitute discrimination).

139. *See* U.S. DEP'T OF LABOR, EMPLOYMENT LAW GUIDE 64 (2005), http://www.dol.gov/compliance/guide/lawguide_2006.pdf (stating authorized workers may not be discriminated against on the basis of national origin or citizenship); OFFICE OF SPECIAL COUNSEL, *supra* note 96 (explaining the concept of document abuse to immigrant workers).

140. *See generally* Strojny, *supra* note 24, at 379 (stating the OSC "was created to enforce IRCA's prohibition against national origin and citizenship status discrimination").

141. IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, HANDBOOK FOR EMPLOYERS, FORM NO. M-274, 1 (1991), http://www.uscis.gov/graphics/lawsregs/handbook/hand_emp.pdf. *But see* Díaz-Pedrosa, *supra* note 15, at 456 (explaining that "the INS's enforcement of the IRCA in the United States has been minimal because it has taken into account the employers' need to employ undocumented workers").

142. Hudson & Schenck, *supra* note 30, at 353.

143. *See id.* (stating federal agency purposes include "preventing unfair labor practices, discouraging discrimination, [and] preserving jobs for Americans").

unavoidably conflict.[144] The multitude of approaches utilized by federal agencies in enforcing the IRCA requirements results in many companies being torn between asking too much and not asking enough of job applicants. Yet, Congress has failed to recognize that it is necessary to amend the IRCA in order to address this conflict. Therefore, employer groups must work together to influence Congress and promote immigration reform.

IV. HOW INTEREST GROUPS CAN PROMOTE IMMIGRATION REFORM

Today hundreds of religious, environmental, business, and labor groups are actively advocating immigration reform in the United States. Although these groups have different interests, origins, and goals, they have something in common—they firmly believe that immigration reform is not only necessary, it is urgent.[145] Therefore, all of these groups are seeking to amend the IRCA. The coalition of small businesses, agricultural groups, and labor unions can influence current immigration reform efforts and ensure Congress resolves inconsistent IRCA provisions in their favor.

A. *Winning Strategies for Promoting Immigration Reform*

Congress has the sole power to pass an IRCA amendment, which would resolve the conflict between the IRCA provisions and lighten the burden on U.S. employers.[146] Therefore, if interest groups are seeking to reform current immigration laws, their priority should be influencing Congress.

To accomplish this goal, interest groups need to come up with multiple, complex, and persistent strategies. First, and most importantly, interest groups must come together and form a uniform alliance. Second, they must familiarize themselves with their supporters and adversaries. Third, they must seek public support in order to influence members of Congress. Fourth, interest groups must rely on direct action and the media in order to influence local constituents and members of Congress. Fifth, they must turn to lobbyists for help. Finally, interest groups must

144. *Id.* ("The full enforcement of one policy conflicts with the purposes of the others.").

145. *See, e.g.*, Negative Population Growth, Inc., Zero Tolerance for Illegal Immigration: An Urgent Policy Need, http://www.npg.org/pospapers/zerotolerance.html (last visited Oct. 10, 2006) (noting the benefits of stopping illegal immigration).

146. *See* U.S. CONST. art. I, § 8, cl. 18 (the Necessary and Proper Clause).

recognize that immigration reform has become a global issue, and it must be addressed in this context.

1. *Forming Alliances*

Several major interest groups are currently advocating lesser penalties for hiring illegal aliens. First, there are agricultural groups, with the American Farm Bureau Federation (FB) serving as one of the key players.[147] Second, there are small businesses, with the National Small Business Association (NSBA) in position as a leader in advocating immigration reform on their behalf.[148] Finally, there are labor unions, with the Service Employees International Union (SEIU)—the country's most powerful union with its 1.8 million members—leading reform efforts on behalf of this constituency.[149]

These organizations, while promoting immigration reform, have different motivations and policy objectives for doing so. FB's primary concern is ensuring that an amended IRCA includes guest-worker provisions.[150] The NSBA seeks to protect small businesses from heavy fines for hiring illegal immigrants.[151] Meanwhile, SEIU's primary goal is legalizing those immigrants who are in the United States illegally.[152] Nevertheless, all three groups have one common goal: obtaining a new immigration measure which would make it less problematic for U.S. employers to hire foreign workers.[153]

Unfortunately, these groups are not working together to influence

147. *See generally* Am. Farm Bureau Fed'n, http://www.fb.org (last visited Oct. 10, 2006) (explaining Farm Bureau's disapproval of the proposed IRCA amendments, which would impose higher penalties for hiring illegal immigrants).

148. *See generally* Nat'l Small Bus. Ass'n, http://www.nsba.biz (last visited Oct. 10, 2006).

149. *See generally* Serv. Employees Int'l Union, http://www.seiu.org (last visited Oct. 10, 2006).

150. Am. Farm Bureau Fed'n, American Farm Bureau Encouraged by Immigration Initiative, http://www.fb.org/index.php?fuseaction=newsroom.newsfocus&year=2006&file=nr0914.html (last visited Oct. 10, 2006).

151. Nat'l Small Business Ass'n, Immigration Bill Passes House, http://www.nsba.biz/content/980.shtml (last visited Oct. 10, 2006).

152. Serv. Employees Int'l Union, Immigration Reform: Support Immigration Reform that Improves Pay and Benefits for All Workers, http://www.seiu.org/issues/issue_immigration.cfm (last visited Oct. 10, 2006).

153. *See generally* Patrick O'Connor, *Immigration Reform Divides GOP*, THE HILL, Dec. 15, 2004, at 11 (discussing various positions regarding immigration reform within the Republican party).

immigration reform. Needless to say, the groups have not been very successful thus far; but if they create a joint coalition, their attempts to influence Washington would be more productive. As one scholar noted, "[t]he creation of large coalitions provides the comfort level necessary to make it easier for politicians to endorse the goal you have established."[154] Therefore, interest groups should utilize joint resources of these organizations and work together to increase the level of media exposure and public support for their position, which in turn would help them successfully rebut the arguments of their adversaries.[155]

2. *Befriending the Adversaries*

Interest groups that advocate less strict IRCA requirements for hiring foreigners face very powerful adversaries—groups seeking to restrict immigration and to preserve jobs for Americans.[156] In fact, Congress may witness "a fierce battle between business, which fears that immigration restrictions will stanch the supply of low-wage workers, and groups that will stress the protectionist and national-security need to tighten border controls."[157]

The Federation for American Immigration Reform (FAIR),[158] the Coalition for the Future American Worker (CFAW),[159] and the American Resistance Foundation (ARF)[160] are among the key interest groups advocating changes in immigration law that would reduce illegal immigration and prevent illegal aliens from becoming legal citizens. This position somewhat conflicts with the position of small business, agricultural, and minority groups, such as FB and NSBA, that advocate a change in immigration law to alleviate the problem of employment discrimination and relieve employers from the heavy penalties they face for

154. BRUCE C. WOLPE & BERTRAM J. LEVINE, LOBBYING CONGRESS 42 (2d ed. 1996).

155. *See id.*

156. *See, e.g.*, Fed'n for Am. Immigration Reform, http://www.fairus.org/site/PageServer (last visited Oct. 10, 2006).

157. O'Connor, *supra* note 153, at 11.

158. *See generally* Fed'n for Am. Immigration Reform, http://www.fairus.org/site/PageServer (last visited Oct. 7, 2006).

159. *See generally* Coal. for the Future Am. Worker, http://www.americanworker.org/ (last visited Oct. 10, 2006) (supported by twenty-one organizations).

160. *See generally* The Am. Resistance Found., http://www.theamericanresistance.com/index.html (last visited Oct. 10, 2006).

hiring illegal workers.[161]

Although the goals of these coalitions are different, they are far from opposite. One coalition seeks to stop illegal immigration, while another seeks a less burdensome alternative for employing foreign workers. Both presumably realize that completely restricting immigration is unnecessary and counterproductive as immigrants help our society to remain innovative and competitive.[162] Yet, these two coalitions have failed to come together because each side has focused narrowly on its own interests.

It has been noted that businesses should partner with interest groups "in many of their everyday activities that involve local communities[,]" [because] . . . [i]t is a mistake . . . to think that [they] are locked into an immutably hostile relationship . . . ."[163] Therefore, a potentially successful strategy for groups of employers like the FB and the NSBA would be to create a coalition with their current adversaries and collectively lobby Congress for reform. Both sides must understand that their common goal is to create immigration laws, which are simple and clear and will reduce illegal immigration while making it easier for U.S. businesses to rely on foreign workers.[164] Without this understanding, both groups will continue to fight each other despite their common interests, weakening their position before Congress.

3. *Relying on Public Support*

In addition to creating coalitions, public pressure is an important channel for interest groups seeking to promote immigration reform. Therefore, interest groups must recruit help from local constituencies in order to foster changes to the current immigration laws.

Because term limits in Congress are relatively short, congressional members constantly worry about upcoming elections and, therefore, strive to address voter concerns. Constituents expect their representatives to understand and reflect their views in Washington,[165] and promoting the

161. *See supra* notes 147–52 and accompanying text.

162. *See* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 219–20 (rev. ed. 2000) ("[I]f you close your country off in any way to either the best brains in the world or the best technologies in the world, you will fall behind faster and faster.").

163. JEFFREY E. GARTEN, THE POLITICS OF FORTUNE: A NEW AGENDA FOR BUSINESS LEADERS 147 (2002).

164. *See* O'Connor, *supra* note 153, at 11 (stating "[i]mmigration reform has bound a number of disparate issues together").

165. ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 126 (2004).

public interest is the most prominent goal of congressional members.[166] Therefore, by shaping the views of constituents, interest groups can secure a positive outcome in congressional debates on immigration reform.

However, what are the current public views on immigration? It is no secret that the American public feels very strongly about illegal immigration. According to recent polls, the public believes that there are too many immigrants in the United States, and many voters are concerned that they are losing jobs to illegal immigrants.[167] Additionally, sixty-two percent of those polled believed that illegal immigration hurts the overall investment climate.[168]

Although it may initially appear that this view negatively impacts the interest groups' strategy, it is important to remember that the public can be persuaded. In fact, when Hispanic voters were asked in 2005 whether they would favor a Republican congressional candidate who "[s]upport[s] immigration reform that would match willing foreign workers with willing U.S. . . . employers when no Americans can be found to fill the jobs," the majority indicated that they *would* support such a candidate.[169] The polls, therefore, demonstrate that voters are most concerned about illegal immigration when their own jobs are threatened.[170] Meanwhile, the public looks favorably upon foreign workers applying for those jobs that are less appealing to U.S. workers.[171]

Therefore, interest groups must first explain to the public that lesser penalties for hiring illegal immigrants will *not* promote illegal immigration. Additionally, interest groups must point out that current penalties make it too burdensome for small businesses and farmers to hire foreign workers for unattractive jobs, which results in higher prices for consumers. If interest groups are successful in getting their message out to the public, voters will pressure their congressional representatives to support amending the existing immigration law.

166. *Id.* at 7.

167. *See, e.g.*, Poll, CBS NEWS/NEW YORK TIMES, Poll conducted on Dec. 2–6, 2005. When asked: "What do you think is the most important problem facing this country today?", three percent mentioned immigration.

168. Poll, GALLUP ORGANIZATION, Poll conducted on March 1–16, 2006.

169. Poll, GREENBERG QUINLAN ROSNER RESEARCH, Poll conducted on June 5–16, 2005. Forty percent indicated that they were "much more likely" and twenty-eight percent were "somewhat more likely" to support such a candidate. *Id.*

170. *See id.*

171. *See id.*

4. *Ensuring Direct Action and Media Coverage*

In addition to public pressure, interest groups must rely on media and direct action as tools for educating both Congress and the general public. First, interest groups need to ensure that they get their message out. This can be done through peaceful protest and rallies, or authoring reports, newsletters, and sponsoring political campaigns. Interest groups must also rely on local and national media.[172]

As some interest groups have recently learned, media is an important channel of influence—a channel which can no longer be ignored.[173] In the United States, news reporting has become a commercialized industry—the news is big business, and reporters are more influential than in the past.[174]

Therefore, interest groups seeking to promote immigration reform must make every effort to understand the media, to figure out how the media works, and to befriend this medium if possible. The silent approach—standing aside in hopes that the reporters will notice the important issues—no longer works. Interest groups must come forward to form relationships with reporters and be open and cooperative with the press.

While there is no magic answer on how to secure positive and extensive media coverage, interest groups will undoubtedly be more successful if they promote a straightforward, clear, and eye-catching message. In order to do this, they must tailor their message to the target audiences, carefully choosing between local and national media coverage, entertainment and news-oriented programs, and the time and length of coverage.

In addition to funding television and newspaper ads, interest groups can also get free media coverage if they provide the news cycle with an engaging issue. For example, a political debate, protest, or a controversial ad can attract media attention and influential political figures to speak on interest groups' behalf.

172. *See* WOLPE & LEVINE, *supra* note 154, at 8 (describing the technological advances, which have increased access to political information).

173. *See, e.g.*, Coal. for the Future Am. Worker, http://www.americanworker.org/advertising2.html (last visited Oct. 10, 2006) (providing a script of CFAW's most recent TV ad, which criticizes current immigration reform efforts).

174. *See* DORIS A. GRABER, MASS MEDIA AND AMERICAN POLITICS 2–5 (6th ed. 2002) (explaining that mass media strongly influences the lives of Americans because it is the source of most news and political information).

5. *Organizing an Effective Lobbying Campaign*

Interest groups must also develop lobbying techniques if they want to successfully influence Congress. As the Microsoft example demonstrates, the biggest mistake a company can make is forgoing a lobbying campaign.[175] Another costly mistake is hiring the wrong lobbyist for the job. Therefore, interest groups must carefully select the lobbyists who can and will actually help them promote immigration reform.

First, the lobbyists should either possess expertise in the areas of immigration and employment law, or be capable of educating themselves to gain this expertise. Second, not only must the lobbyists be experienced, but they must also be well-connected and known on Capitol Hill.[176] Third, the lobbyists must be willing to pay attention to detail, because "[t]he lobbyist's worst enemy is not political opposition but ignorance."[177] Fourth, the lobbyists must be passionate about their message. Finally, they need to make it easy for legislators to support their position, which can be achieved by presenting Congress with clear position papers and by promising public support.[178]

Furthermore, because "Congress does not enjoy an absolute monopoly in lawmaking," lobbyists must also focus on executive lobbying.[179] Immigration is a hot issue within the White House as well as an issue that will likely be raised in the next presidential election. Therefore, lobbying both the executive and the legislative branches simultaneously may prove to be a very successful strategy.[180]

175. John M. Broder, *Microsoft Tries Another Court: Public Opinion*, N.Y. TIMES, June 12, 2000, at A1 ("Microsoft had been slow to realize that it needed to engage in Washington lobbying and other public relations efforts, but . . . it had changed course after realizing rivals were successfully portraying the company as a bully.").

176. *See* WOLPE & LEVINE, *supra* note 154, at 26 ("If you are known [as a lobbyist] or understood or perceived only on the basis of your issue, your effectiveness is diminished.").

177. *Id.* at 11.

178. *See id.* at 27, 29 (stating that there must be a public policy purpose to all legislation, and it is important that every issue be simplified to a central theme).

179. *Id.* at 69.

180. *See id.* ("[L]obbyists virtually ignore the existence of the executive branch. They do this at their client's peril.").

B. *Immigration Reform Is No Longer "Local"*

According to Thomas Friedman, the world is, once again, flat.[181] Today, "Americans feel their lives affected more and more by events originating outside the country."[182] Immigration is becoming a global issue—similar to terrorism, child labor, and poverty.[183] Job outsourcing,[184] border patrol, and discrimination against minorities are just a few of the many immigration-related problems facing the United States today. Washington must increasingly rely on foreign relations policies and cooperation with other nations to cure these problems. As a result, immigration reform in the United States is in need of a global solution.

There are several key nations affecting the current immigration situation in the United States. According to the 2000 census, Mexico, India, and China were among the top countries responsible for the increase in the foreign-born population present in the United States.[185] Mexico alone accounted for one-fourth of all immigrants.[186] Not only are these immigrants usually willing to work for less than natural citizens, but often they are also very skilled, educated, and hardworking.[187] As a result, domestic industries rely heavily on foreign workers. However, when trying to hire foreigners, they face three serious barriers: overwhelming resistance from U.S. workers who are afraid of losing their jobs to foreigners; burdensome compliance with I-9 document verification requirements; and discrimination lawsuits by foreign workers who feel they face overreaching document scrutiny during the hiring process.

To solve this problem, government and business must come together and create stronger immigration laws, which will not only reduce illegal immigration, but will also protect domestic industries from financial pressure. First, the government needs to rely on the advice of domestic

181. THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005).

182. JOSEPH S. NYE JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 77 (2002).

183. *See* FRIEDMAN, *supra* note 162, at 292–93 (discussing the benefits of having educated, foreign-born people live and work in the United States).

184. *Id.* at 227 (discussing job outsourcing).

185. Fed'n for Am. Immigration Reform, *Immigration's Impact on the U.S.*, http://www.fairus.org/site /PageServer?pagename=research_research9605 (last visited Oct. 10, 2006).

186. *Id.*

187. *See* FRIEDMAN, *supra* note 181, at 292 (stating that foreign-born people possessing technical skills would be good candidates for citizenship).

industries and producers—often the real experts on the issue. As one business executive stated: "We will need a stronger and more supportive immigration system if we want to hire the people who want to stay here. Otherwise, we will go where they are."[188]

Additionally, the government must provide incentives to countries such as Mexico, India, and China so that they will cooperate and help improve the immigration situation in the United States. To achieve this, some scholars argue that "[t]he United States should aim to work with other nations on global problems in a multilateral manner."[189] Some even believe that the United States must give aid to these countries so that their citizens do not "pour across our borders like the 'peso refugees' across the Rio Grande."[190] Regardless of whether these options are feasible, what is clear is that the United States should seek help from these nations if the immigration reform is to be successful.[191]

For example, the United States needs help controlling the Mexican and Canadian borders.[192] More effective control of these borders would be possible if the government would rely on foreign nations and private corporations; first, by "reach[ing] beyond the national borders through intelligence and cooperation inside the jurisdiction of other states" and, second, by relying on businesses to develop transparent systems for tracking shipments.[193] Additionally, the United States can help these foreign countries create incentives for citizens to return home upon completion of their work contracts in the United States. This can be done by reminding workers of their national identities, by reinforcing patriotic views, and by improving stability in foreign countries. Finally, U.S. businesses can also provide additional incentive for foreign workers to return home by helping them obtain compatible jobs in their home countries.

Interest groups seeking to promote immigration reform face the difficult task of reminding the U.S. government that immigration remains a global issue. These groups must explain to Washington officials that the U.S. government, local businesses, and foreign nations need to work

188. FRIEDMAN, *supra* note 181, at 274.

189. NYE, *supra* note 182, at 157.

190. JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 226 (2004) (discussing different views on how to make globalization more effective).

191. *See* NYE, *supra* note 182, at 157 (stating the United States needs to cooperate with other nations on global issues).

192. *Id.* at 56.

193. *Id.* at 57.

together to create a stronger immigration policy in the United States. Without global cooperation, future attempts to promote immigration reform may fail.

The immigration system in the United States needs a comprehensive and bipartisan solution. Therefore, interest groups seeking to promote immigration reform must form strong alliances and actively lobby Congress to pass amendments to the IRCA that will resolve the tensions between the document verification and employment provisions. In addition, even if interest groups successfully persuade Congress to initiate the change, they must also figure out which legislative proposal would make the IRCA most effective.

V. PROPOSED AMENDMENTS

When there are conflicting policy interests or conflicting provisions in a statute, the Supreme Court tries to balance the interests and give effect to both provisions if possible.[194] As the analysis of recent cases demonstrates, the IRCA provisions conflict with each other in that they force employers to choose between violating one provision over the other. Simply put, "current labor and employment law policy is inadequate in dealing with the undocumented worker."[195] However, the courts and Congress have failed to address this problem. In 2005, several members of the United States Congress proposed changes and amendments to the IRCA. Most of these proposals, however, failed to recognize the inherent conflict in the IRCA's provisions. As the labor market in the United States rapidly expands beyond the country's boundaries, statutory reform is necessary to ensure that U.S. employers are not discouraged into moving their businesses overseas, or in the alternative, from refusing to hire foreign-looking and foreign-sounding employees.

A. *Flaws in Current Legislative Proposals*

Although members of Congress realize the need to revise current IRCA standards, their proposals do not adequately address the problem of discrimination. In fact, recent legislative proposals do not even attempt to discuss the difficulties that employers face as a result of tension between the IRCA's verification and antidiscrimination provisions.[196] Legislators,

194. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("If two laws conflict with each other, the courts must decide on the operation of each.").

195. Hudson & Schenck, *supra* note 30, at 353.

196. *See* Díaz-Pedrosa, *supra* note 15, at 456 (discussing agricultural producers'

aiming to please their constituents, merely seek to impose higher penalties—either on employers or on job applicants—for violation of these provisions.[197]

1. *10K Run for the Border Act*

One such example is a bill called the 10K Run for the Border Act, through which Congresswoman Sue Myrick asked Congress to impose *higher* penalties on employers for hiring illegal immigrants.[198] Myrick, eager to satisfy her constituency groups, apparently believes that the best way to deal with illegal immigration is to heavily penalize employers who hire illegal aliens.[199] If Congress adopts Myrick's proposal, employers would potentially be liable for up to $1.6 million in penalties.[200]

The 10K Run for the Border Act not only seeks to penalize employers with outrageously heavy fines but also fails to address the potential employment discrimination that could arise from such penalties. The harsh reality of this proposal is that it makes it more cost-efficient to discriminate. Employers, concerned about going out of business and eager to comply with work eligibility verification requirements, will view individual discrimination lawsuits as a very light burden compared to the heavy penalties faced for hiring illegal aliens. As a result, employers will most likely choose to play it safe by turning down qualified foreign applicants.

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fears that the number of employees would be reduced if the IRCA was more strictly enforced).

197. *Id.* at 457.

> American politicians inconsistently express their views on the enforcement of immigration laws. On one hand, politicians are happy to enforce external border controls to appease the concerns of a political constituency that expects the borders to be protected and non-porous. But on the other hand, they are cautious not to completely halt the flow of illegal immigration because they know that they "owe their seats to the patronage of right-wing manufacturing and agribusiness interests desirous of nothing so much as a low minimum wage and unfettered access to cheap, nonunion labor from the Third World."

Id. (footnotes omitted).

198. 151 CONG. REC. H8088 (daily ed. Sept. 15, 2005) (statement of Rep. Myrick).

199. H.R. 3806, 109th Cong. (2005), *available at* http://www.govtrack.us/data/us/bills.text/109/h/h3806.pdf.

200. *Id*.

2. *Comprehensive Enforcement and Immigration Reform Act of 2005*

Equally flawed is Senator Cornyn's proposal seeking to impose penalties on employees.[201] His Comprehensive Enforcement and Immigration Reform Act of 2005 would impose heavy fines on job applicants making false claims of citizenship for purposes of obtaining employment.[202] Namely, Cornyn proposes the following amendment to the IRCA: "Any individual who falsely represents that the individual is a citizen for purposes of obtaining employment shall, for each such violation, be subject to a fine of not more than $5,000 and a term of imprisonment not to exceed 3 years."[203] Similar to Myrick, Cornyn seeks to increase penalties on employers who hire illegal aliens.[204]

Senator Cornyn's proposal also fails to address several additional problems, which his Comprehensive Enforcement and Immigration Reform Act of 2005 brings to light. First, similar to Myrick's proposal, this Act increases the risk of document abuse and discrimination by making penalties for hiring illegal workers twice as high as penalties for committing document abuse.[205] Second, the Act makes it more likely that employers will threaten to report illegal job applicants to the Department of Homeland Security, making it more difficult for employees to assert their rights. Third, the Act simply makes it too expensive for employers to do business by forcing them to pay up to $20,000 for each instance of hiring an illegal worker, regardless of their need for foreign workers, and, quite possibly, regardless of their knowledge of the illegal status of the employee.[206] Fourth, by imposing fines on illegal job applicants, the Act fails to recognize that illegal aliens will not be deterred by fines—because they already face criminal penalties and probably do not have the money to pay the fines. Instead, the Act simply increases the burden on the government to enforce the new IRCA provisions by trying to recover fines from illegal aliens.[207]

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201. S. 1438, 109th Cong. (2005), *available at* http://www.govtrack.us/data/us/bills.text/109/s/s1438.pdf; *see also* 151 CONG. REC. S8923 (daily ed. July 26, 2005) (statement of Sen. Cornyn) (presenting his views on immigration reform).

202. S. 1438, 109th Cong. (2005), *available at* http://www.govtrack.us/data/us/bills.text/109/s/s1438.pdf.

203. *Id.*

204. *Id.* Unlike Myrick's proposal, however, Cornyn's proposal is somewhat more reasonable in that it seeks to only double the current fines. *See id.*

205. *See id.* (proposing that current penalties for § 1324a violations be increased from $250–$10,000 to $500–$20,000).

206. *See id.*

207. *See id.* (proposing to impose a $5,000 fine on any illegal alien "who falsely

Finally, Cornyn's proposal entirely disregards the problem of the IRCA's conflicting provisions—as his proposal does not even mention discrimination and document abuse and fails to recognize that these are important issues in the discussion of employer sanctions. Not only does the Comprehensive Enforcement and Immigration Reform Act of 2005 inadequately address the document abuse problem, it further exacerbates an already-existing discrimination problem by increasing the potential penalties on the employers who hire illegal workers.

3. *Employment Verification Act and Basic Pilot Program*

In 1996, realizing the need for change, Congress created a pilot program to help employers verify the eligibility of newly hired employees.[208] Employers who choose to participate in this program are able to submit social security numbers to be checked against the records of the Social Security Administration.[209] This program helps identify fake social security numbers, determine whether the name matches the number on the card, and establish whether an individual is authorized to work in the United States.[210]

A recent study indicates the program has been a great success, and "employers participating in the pilot program find it of immense help in the day-to-day operations of their businesses."[211] Not only did the pilot program help employers alleviate uncertainties regarding work authorization, it also greatly reduced the risk that employers may face allegations of document abuse.[212] Opponents of the program, however, argue that the system is flawed and should not be implemented.[213]

Senator Hagel introduced a bill called the Employment Verification Act of 2005.[214] The Act finds its roots in the basic pilot program, which

represents that the individual is a citizen for purposes of obtaining employment").

208. *See* 149 CONG. REC. H9893 (daily ed. Oct. 28, 2003) (statement of Rep. Sensenbrenner) (moving to extend the basic pilot program for employment eligibility verification).

209. *Id.*

210. *Id.*

211. *Id.* at H9893–H9894 (statement of Rep. Hostettler).

212. *See id.* at H9895 (statement of Rep. Hinojosa) ("[T]his bill puts in place the mechanism for eventual adoption of a national identification system.").

213. *See id.* ("[T]his proposed bill establishes the precursor of a national identification system by amalgamating data of citizens and immigrants into what is effectively a single database that would be used for multiple purposes.").

214. 151 CONG. REC. S11825 (daily ed. Oct. 25, 2005) (statement of Sen. Hagel); S. 1917, 109th Cong. (2005), *available at* http://www.govtrack.us/data/

Hagel seeks to replace with a more sophisticated version—the Employment Eligibility Verification System.[215] In effect, if Hagel's proposal is adopted, the Social Security Administration will be required to maintain a system through which employers can verify employment eligibility.[216] Employers will have to run the social security number of every job applicant through the system before making hiring decisions.[217] Meanwhile, the Employment Verification Act of 2005 would make it unlawful to discriminate against those applicants whose status may cause added difficulties when using the system.[218]

This proposal, while complex and expensive, nevertheless tries to address the discrimination problem and protect employers from discrimination lawsuits.[219] Despite its merits, however, Senator Hagel's bill will most likely stall in the Senate. First, it raises significant invasion of privacy and identity theft concerns.[220] Second, the government and employers may argue that the system is too burdensome and expensive to implement. Third, the proposal does not address the problem of work-authorized employees who do not yet have valid social security numbers or who only recently became eligible to work.[221]

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us/bills.text/109/s/s1917.pdf.

215. *See* S. 1917, 109th Cong. (2005), *available at* http://www.govtrack.us/data/us/bills.text/109/s/s1917.pdf.

216. 151 CONG. REC. S11825 (daily ed. Oct. 25, 2005) (statement of Sen. Hagel).

217. *See* S. 1917, 109th Cong. (2005), *available at* http://www.govtrack.us/data/us/bills.text/109/s/s1917.pdf.

218. *See id.* (stating that the government must ensure that the Employment Eligibility Verification System "does not result in increased discrimination or cause reasonable employers to conclude that employees of certain races or ethnicities are more likely to have difficulties when offered employment due to the operation of the system").

219. *See* 151 CONG. REC. S11825–S11826 (daily ed. Oct. 25, 2005).

220. 149 CONG. REC. H9894 (daily ed. Oct. 28, 2003) (statement of Rep. Hinojosa) ("The expansion of the pilot program would effectively create a single database, with no privacy protections, that would make it much easier for the government to track its own citizens.").

221. *See id.* ("Although the program is not supposed to be used as a prescreening mechanism before employment is offered, many employers are basing hiring decisions on these checks. As a result, eligible workers are being denied employment opportunities because an outdated database says they are not eligible to work.").

B. *An Alternative Proposal*

Rather than trying to impose a greater burden on employers, Congress should shift some of the verification burden to governmental agencies. This can be accomplished through two means, which are not mutually exclusive. First, Congress could adopt a modified version of Senator Hagel's proposal by creating a mechanism for verifying employment eligibility status while simultaneously addressing the concerns associated with this program.[222] According to a recent study, such a mechanism would effectively alleviate much of the burden and cost of verification currently imposed on employers.[223] Furthermore, the study showed "that 'the Social Security Administration and INS are currently capable of handling' such a nationwide voluntary program."[224]

Therefore, if this mechanism for verifying employment eligibility is effective and easy to implement, it will successfully resolve the discrimination problem and ease the burden on employers. First, the employers will be required to check the status of all recently hired employees. Second, they will do so with the help of an inexpensive computer program. Third, they will have no incentive to discriminate based on their fear of being fined for hiring illegal aliens because running social security numbers through the system will satisfy the IRCA's verification requirements.[225]

However, if a mandatory, uniform system for employment eligibility verification is not feasible, "Congress could still make everyone's life a lot simpler by requiring that the *only* acceptable document all aliens, including permanent residents, can present to satisfy IRCA's employer sanctions provision is an USCIS issued document."[226] In other words, Congress could provide specific, set requirements for the three distinct groups of employees. For example, U.S. citizens would be required to show birth

222. *See* S. 1917, 109th Cong. (2005), *available at* http://www.govtrack.us/data/us/bills.text/109/s/s1917.pdf.

223. *See* 149 CONG. REC. H9893 (daily ed. Oct. 28, 2003) (statement of Rep. Sensenbrenner) (A recent study "found that 96 percent of participating employers believe the pilot to be an effective and reliable tool for employment verification; 94 percent believed it to be more reliable than the IRCA-required document check; and 83 percent believed that participating in the pilot reduced uncertainty regarding work authorization.").

224. *Id.*

225. *See* 8 U.S.C. § 1324a(b)(1)(C)(i) (2000) (stating that a social security card indicates that a person is eligible to work in the United States).

226. Strojny, *supra* note 24, at 404 (emphasis in original).

certificates or U.S. passports; permanent residents would have to show an alien registration card or a stamped foreign passport; and all other job applicants would have to present an employment authorization issued by the CIS.

Another way to address the tension between the antidiscrimination and verification provisions is to exempt employers from damage suits that arise from the request of additional documents. This proposal would ensure that employers are in a position to verify employment eligibility without the added risk of having to pay high damage awards. Meanwhile, fines and lawsuits for injunctive relief, such as reinstatement or promotion, would still be available, and would ensure that employers do not have an incentive to discriminate. Arguably, employees will only be willing to expend time and resources on litigation if their claims are legitimate. This, in turn, would promote an inexpensive means of alternative dispute resolution and produce efficient results.

It appears a combination of these two approaches would produce the best result. If Congress would implement a nationwide system for verifying employment eligibility through social security numbers that would also protect the employers from lawsuits for damages, this would accomplish what the creators of the IRCA really intended. Employers will be able to verify employment eligibility through the inexpensive means of a computer program. Employers will also be protected from damage awards and will no longer be haunted by the fear of frivolous litigation. This will allow employers to actually help reduce illegal immigration in the United States. At the same time, employees will be protected from discriminatory practices because they can report such practices to the Department of Justice and file a lawsuit for injunctive relief. Such a win-win situation would, therefore, adequately address all legitimate concerns in this area.

VI. CONCLUSION

When Congress passed the Immigration Reform and Control Act twenty years ago, its primary objective was to end illegal immigration. As the years passed, however, it became increasingly clear that lawful immigrants who looked or sounded foreign unavoidably became the target of increased scrutiny and discrimination in the U.S. job market. As a result, Congress sought to amend the IRCA to protect these qualified, work-authorized employees from employment discrimination. Employers, in turn, faced added inconsistencies in the IRCA provisions, requiring careful balancing of the IRCA's § 1324a requirement to inspect the documents of every job applicant and the § 1324b prohibition on asking for

more or different documents than allowed by law.

These seemingly simple provisions became difficult to comply with in instances where employers had doubts as to the authenticity of the presented documents. In these cases, if an employer asked for additional proof, there was a risk that the employer was engaging in document abuse. Meanwhile, if an employer tried to comply with the document abuse provisions and hired the worker despite doubts about the worker's legal status, there was a risk that the employer violated the document verification provisions.

Even today, despite numerous amendments and congressional debates, the Immigration Reform and Control Act presents significant inconsistencies, which make it impossible for U.S. employers to comply with its conflicting provisions. On the one hand, employers are required to monitor illegal immigration by reviewing documents of all job applicants. On the other hand, employers must be careful not to discriminate against foreign workers by requiring supplemental proof of work eligibility.

As a result, employers are uncertain how to resolve this conflict in the IRCA provisions and are forced to find a middle ground, risking penalties and lawsuits by choosing one alternative over another. Because illegal immigration and employment discrimination harm the U.S. job market, the government seeks to prevent these problems by imposing heavy penalties on both hiring illegal immigrants and engaging in document abuse.

As this Article demonstrates, the current Immigration Reform and Control Act is outdated, and for the last twenty years it has failed to address the tensions that exist in the antidiscrimination and document verification provisions. A closer look at the IRCA reveals that it is needlessly complex, and studies show that compliance with both immigration and antidiscrimination policy would increase if the law was simpler. Furthermore, the IRCA places the burden of controlling illegal immigration and preventing discriminatory employment practices on U.S. employers rather than on the government.

The IRCA, in effect, requires employers to serve two masters. In addition to respecting the legitimate rights of workers, employers must also assist the U.S. government in preventing illegal immigration. Therefore, a legislative amendment is necessary to address the requirements and goals of the IRCA. This amendment must protect employers from discrimination lawsuits, alleviate their document verification burden, or eliminate ambiguities in the document verification provisions.