Immigration-Related Worksite Enforcement: Performance Measures

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Summary

In the spring of 2009, the Department of Homeland Security (DHS) issued new guidance on immigration-related worksite enforcement. Under the guidelines, DHS "will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment." According to 2010 estimates, there are some 8.0 million unauthorized workers in the U.S. civilian labor force.

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

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

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

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

This report will be updated when new data become available.

Contents

Tables

Contacts

Introduction

In April 2009, the Department of Homeland Security (DHS) issued new guidance on immigration-related worksite enforcement—the enforcement of prohibitions on the employment of unauthorized aliens in the United States. In the words of DHS, the updated guidance "reflects a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers."[1] According to 2010 estimates, there are some 8.0 million unauthorized workers in the U.S. civilian workforce.[2]

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

Unauthorized Workers

According to the most recent estimates by DHS, some 11.5 million unauthorized immigrants were living in the United States in January 2011.[3] The Pew Hispanic Center's (the Center's) unauthorized alien population estimate for March 2010 was 11.2 million.[4] It is widely believed that most unauthorized aliens enter and remain in the United States in order to work.

The Pew Hispanic Center has further estimated that there were 8.0 million unauthorized workers in the U.S. civilian labor force in March 2010. These unauthorized workers accounted for 5.2% of the civilian labor force. In an earlier analysis, the Center estimated that there were 8.3 million unauthorized workers in 2008, representing 5.4% of the civilian labor force that year. As part of that earlier analysis, the Center found that unauthorized workers' share of the labor force in some occupations and industries was considerably higher than their 5.4% overall share.[5] **Table 1** presents 2008 data from the Pew Hispanic Center on industries with relatively high concentrations of unauthorized workers.

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

[2] Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, Pew Hispanic Center, February 1, 2011, p. 17 (hereafter cited as Passel and Cohn, *Unauthorized Immigrant Population, 2010*).

[3] U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker, March 2012, p.1.

[4] Passel and Cohn, *Unauthorized Immigrant Population, 2010*, p. 9.

[5] Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States*, Pew Hispanic Center, April 14, 2009, pp. 12-16 (hereafter cited as Passel and Cohn, *A Portrait of Unauthorized Immigrants*).

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

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

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

DHS Enforcement

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

Enforcement of the prohibitions on unauthorized employment in INA §274A—or *worksite enforcement*—has been the job of DHS's U.S. Immigration and Customs Enforcement (ICE) since 2003.[8] Worksite enforcement is one component of ICE's responsibility to enforce federal immigration laws within the United States, known as *interior enforcement*. Employers violating the INA §274A prohibitions on unlawful employment may be subject to civil and/or criminal penalties.

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

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

[7] For information on E-Verify, see CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

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

[9] See written statement of Robert Bach, Executive Associate Commissioner for Policy and Planning, INS, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration and Claims, *Immigration and* (continued...)

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

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

> ICE applies risk assessment principles to critical infrastructure and worksite enforcement cases in order to maximize the impact of investigations against the most significant threats and violators. For example, unauthorized workers employed at sensitive sites and critical infrastructure facilities—airports, seaports, nuclear plants, chemical plants and defense facilities—could pose serious homeland security threats. These investigations are given a higher priority.[11]

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

In July 2009, as part of its new worksite enforcement strategy, ICE announced it was launching a new initiative to increase inspections, or audits, of business owners' I-9 records (see above) to determine whether they were in compliance with employment eligibility verification laws and regulations. According to ICE, "inspections are one of the most powerful tools the federal government has to enforce employment and immigration laws."[13]

In written testimony for a February 2011 hearing on worksite enforcement by the House Subcommittee on Immigration Policy and Enforcement, ICE Deputy Director Kumar Kibble stated that the agency was "focused on criminally investigating and prosecuting employers who exploit or abuse their employees and have a history of knowingly and repeatedly employing an illegal workforce." He described ICE's approach to worksite enforcement under the April 2009 guidance as follows:

> Enforcement efforts focused on employers effectively target the root causes of illegal immigration. In April 2009, ICE released a worksite enforcement strategy designed to: 1) penalize employers who knowingly hire illegal workers; 2) deter employers who are tempted to hire illegal workers; and 3) encourage all employers to take advantage of easy to use and well-crafted compliance tools. We carry out this strategy with the robust use of Form I-9 inspections, civil fines and debarment, and by promoting compliance tools like E-Verify

(...continued)

Naturalization Service's Interior Enforcement Strategy, 106th Cong., 1st sess., July 1, 1999 (Washington: GPO, 2000), p. 13.

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

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

[12] Ibid.

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

through the ICE Mutual Agreement between the Government and Employers (IMAGE) program.[14]

Penalties

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

Civil Penalties

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

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

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

Criminal Penalties

Under INA §274A, employers convicted of having engaged in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens may face criminal fines and/or imprisonment.

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[14] Written statement of ICE Deputy Director Kumar Kibble for U.S. Congress, House Judiciary Committee, Subcommittee on Immigration Policy and Enforcement, *ICE Worksite Enforcement - Up to the Job?*, hearing, 112th Cong., 1st sess., January 26, 2011, pp. 2-3, http://judiciary.house.gov/hearings/pdf/Kibble01262011.pdf (hereafter cited as written hearing statement of ICE Deputy Director Kumar Kibble, January 26, 2011). The ICE website contains information about the ICE IMAGE program, http://www.ice.gov/image/.

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

They may be fined not more than $3,000 for each unauthorized alien with respect to whom the violation occurred and/or imprisoned for not more than six months for the entire pattern or practice.

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

Program Performance

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

Administrative Fines

As discussed above, INA §274A establishes civil penalties for violations of the I-9 requirements and for unlawful employment. **Table 2** provides annual data on Final Orders for civil money penalties (also known as *civil or administrative fines*) for FY1999 through FY2011. It shows that after increasing between FY1999 and FY2000, the number of Final Orders and associated administrative fines decreased from FY2000 to FY2004. In FY2006, both measures equaled "0." Since FY2006, both measures have posted gains.

Table 2 reflects changes over the years in the use of administrative fines as an enforcement tool. As noted above, the new DHS worksite enforcement strategy makes increased use of civil fines. In written testimony for a 2009 House hearing, Marcy Forman, then director of the ICE Office of Investigations, discussed ICE's renewed focus on civil fines:

> In crafting our worksite enforcement strategy, ICE has restructured the worksite administrative fine process to build a more vigorous program. ICE has established and distributed to all field offices guidance about the issuance of administrative fines and standardized criteria for the imposition of such fines. We expect that the increased use of the administrative fines process will result in meaningful penalties for those who engage in the employment of unauthorized workers.[16]

Despite the increases in recent years, however, the number of Final Orders for civil money penalties remains very low relative to the number of U.S. employers. Employers receiving Final Orders in any year shown in **Table 2** represent less than .01% of U.S. employers.[17]

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

[17] According to the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB), there were 5.8 million firms in the (continued...)

Table 2. Final Orders and Administrative Fines, FY1999-FY2011

Fiscal Year	Number of Final Orders Issued	Administrative Fines Imposed
1999	215	$1,674,672
2000	312	$3,337,472
2001	297	$2,037,509
2002	91	$485,128
2003	52	$289,814
2004	10	$90,249
2005	10	$455,870
2006	0	$0
2007	2	$26,560
2008	18	$675,209
2009	52	$1,033,291
2010	237	$6,956,026
2011	385	$10,463,988

Source: CRS presentation of data from U.S. Department of Homeland Security, Immigration and Customs Enforcement, May 3, 2012.

Note: "Administrative Fines Imposed" is the same as ICE's measure of "Final Order Amounts."

Administrative and Criminal Arrests

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

Table 3. Administrative and Criminal Arrests in Worksite Enforcement Operations, FY2003-FY2011

Fiscal Year	Number of Individuals Arrested on Administrative Charges	Number of Individuals Arrested on Criminal Charges
2003	445	72
2004	685	165
2005	1,116	176

(...continued)

United States in 2009. SUSB data are available on the Census Bureau's website, http://www.census.gov/econ/susb/index.html.

Fiscal Year	Number of Individuals Arrested on Administrative Charges	Number of Individuals Arrested on Criminal Charges
2006	3,667	716
2007	4,077	863
2008	5,184	1,103
2009	1,647	444
2010	1,217	448
2011	1,471	713

Sources: CRS presentation of data from written statement of the Honorable Michael Chertoff, Secretary, U.S. Department of Homeland Security, for the U.S. Senate Judiciary Committee, February 28, 2007 (FY2003-FY2004); and from Department of Homeland Security, Immigration and Customs Enforcement, July 1, 2008 (FY2005-FY2007), April 22, 2010 (FY2008-FY2009), February 10, 2011 (FY2010), and April 27, 2012 (FY2011).

Note: The same individual may be the subject of an administrative arrest and a criminal arrest.

During each year from FY2003 to FY2008, as shown in **Table 3**, the number of administrative and criminal arrests in worksite enforcement operations increased; some of the yearly changes, as from FY2005 to FY2006, were marked. In 2008 congressional testimony, DHS Secretary Michael Chertoff highlighted the number of administrative and criminal arrests in worksite enforcement operations in FY2007 as evidence of the progress being made by ICE on the worksite enforcement front.[18]

Between FY2008 and FY2009, as indicated in **Table 3**, the number of individuals arrested on administrative and criminal charges plummeted. The number of administrative arrests in FY2011 remained below the FY2009 level and well below the FY2008 level. The number of criminal arrests increased between FY2009 and FY2011, but the FY2011 number was still well below the FY2008 level. The reasons for the overall decreases in administrative and criminal arrests between FY2008 and FY2011 are unclear, but they may reflect, to some degree, ICE's stated renewed focus on employers.

In his 2011 House testimony, ICE Deputy Director Kibble responded to concerns expressed by some Members of Congress about the diminished number of administrative arrests in worksite enforcement operations:

> The number of administrative arrests at worksites cannot, and should not, be considered in a vacuum. For the past two years, our worksite efforts have been part of a broader enforcement strategy that has seen the removal of more individuals from the United States than at any other time in the agency's history. ICE is apprehending, detaining, and removing an unprecedented number of individuals who are unlawfully present in the country—regardless of where they are apprehended.[19]

ICE worksite enforcement arrest statistics for FY2009 and FY2010 provided to CRS contain employment position titles for most individuals who were arrested on administrative or criminal charges.[20] Of the 1,647 total worksite enforcement administrative arrests in FY2009, employment

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

[19] Written hearing statement of ICE Deputy Director Kumar Kibble, January 26, 2011, p. 4.

[20] ICE worksite enforcement arrest statistics grouped by position provided by ICE Office of Congressional Relations to (continued...)

position information is available for 1,153 individuals.[21] Non-managerial employees accounted for 1,112 of these 1,153 arrests (96%), while managerial employees with position titles that included owner, manager, and corporate official accounted for the remaining 41 arrests (4%). Of the 1,217 total administrative arrests in FY2010, employment position information is available for 897 individuals.[22] Non-managerial employees accounted for 821 of these 897 arrests (92%), while managerial employees accounted for the remaining 76 arrests (8%).[23]

With respect to worksite enforcement criminal arrests, employment position information is available for 403 of the 444 individuals arrested on criminal charges in FY2009.[24] These 403 individuals included 289 non-managerial employees (72%) and 114 managerial employees with position titles that included owner, manager, and corporate official (28%). Of the 448 individuals arrested on criminal charges in FY2010, employment position information is available for 385.[25] Non-managerial employees accounted for 189 of these 385 arrests (49%), while managerial employees accounted for 196 criminal arrests (51%). Thus, while the number of overall criminal arrests in worksite enforcement operations was quite similar between FY2009 and FY2010, the number of managerial employees among the arrestees increased from 114 to 196. This increase, which is in line with ICE's stated focus in the worksite enforcement area on criminally investigating and prosecuting employers who knowingly employ unauthorized workers, follows a decline in criminal arrests among managerial employees between FY2008 and FY2009. The comparable number of managerial employee criminal arrests in FY2008 was 135, according to ICE.[26]

Viewed more broadly, ICE administrative and criminal arrests in worksite enforcement operations represent a very small percentage of the potential population of violators. For example, **Table 3** shows a high of 5,184 administrative arrests in worksite operations in FY2008. That year, according to the Pew Hispanic Center, there were an estimated 8.3 million unauthorized aliens in the U.S. civilian labor force.[27] With respect to criminal arrests, the potential population of employers and workers committing worksite-related criminal violations is not known.

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CRS, May 27, 2010 (FY2009 statistics, as of October 29, 2009), and February 10, 2011 (FY2010 statistics, as of February 9, 2011).

[21] The 1,153 figure excludes individuals arrested in worksite enforcement operations who were found to have no worksite involvement.

[22] The 897 figure excludes individuals arrested in worksite enforcement operations who were found to have no worksite involvement.

[23] Percentages do not sum to 100% due to rounding.

[24] The 403 figure excludes individuals arrested in worksite enforcement operations who were found to have no worksite involvement.

[25] The 385 figure excludes individuals arrested in worksite enforcement operations who were found to have no worksite involvement.

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

[27] Passel and Cohn, *A Portrait of Unauthorized Immigrants*, p. 12.

Criminal Prosecutions and Fines

Table 4 provides data on criminal prosecutions related to worksite enforcement investigations for FY2005-FY2011.[28] These data build on the criminal arrest data in **Table 3**. As shown in **Table 4**, the number of criminal indictments and criminal convictions rose steadily from FY2005 until FY2008, and then fell markedly between FY2008 and FY2009. In FY2011, both measures were higher than in FY2009 but lower than in FY2008. It is difficult to draw direct conclusions from these data about the worksite enforcement program in any particular year. One reason for this is that there can be time lags between arrests, indictments, and convictions.

Table 4. Criminal Indictments and Convictions Related to Worksite Enforcement Investigations, FY2005-FY2011

Fiscal Year	Indictments	Convictions
2005	254	156
2006	411	340
2007	750	561
2008	900	908
2009	361	339
2010	404	333
2011	639	586

Source: CRS presentation of data from U.S. Department of Homeland Security, Immigration and Customs Enforcement, July 1, 2008 (FY2005-FY2007), April 22, 2010 (FY2008-FY2009), February 10, 2011 (FY2010), and April 27, 2012 (FY2011).

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

Table 5 provides data on criminal fines and forfeitures related to worksite enforcement investigations that were imposed in FY2003-FY2011. ICE characterizes these data as follows:

> Criminal fines and forfeitures include fines imposed by a U.S. District Court as a result of a criminal conviction, seizures made by ICE and forfeited to the U.S. government, payments made to ICE in lieu of the seizure and forfeiture of real or personal property, and restitution payments made by an employer to their unauthorized alien employees as a result of labor law violations.[29]

As shown in **Table 5**, worksite enforcement-related criminal fines and forfeitures have varied dramatically during the FY2003-FY2011 period, although they have remained well above the FY2003 level in all subsequent years. In light of the various types of fines and forfeitures (as indicated in the above description from ICE) and associated time lags, which presumably help explain the great annual variability, it may be that the total for any particular year is less significant than the fact that criminal fines and forfeitures were being pursued.

[28] Comparable data are not available for earlier years.

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

Table 5. Criminal Fines and Forfeitures Related to Worksite Enforcement Investigations, FY2003-FY2011

Fiscal Year	Criminal Fines and Forfeitures Imposed
2003	$37,514
2004	$2,929,000
2005	$15,822,100
2006	$233,044
2007	$31,426,443
2008	$21,978,918
2009	$32,578,945
2010	$36,611,320
2011	$7,189,631

Source: CRS presentation of data from U.S. Department of Homeland Security, Immigration and Customs Enforcement, July 1, 2008 (FY2003-FY2007), April 22, 2010 (FY2008-FY2009), February 3, 2011 (FY2010), and April 27, 2012 (FY2011).

In summary, the data presented here offer an available, but limited, means to examine the performance of ICE's worksite enforcement program. Some measures, namely Final Orders issued and administrative fines imposed, followed a downward trend after 2000 and then an upward trend in more recent years. Other measures, namely administrative arrests, criminal arrests, criminal indictments, and criminal convictions, registered increases from the initial years included here until FY2008, followed by significant decreases from FY2008 to FY2009. These measures, with the exception of administrative arrests, posted significant increases between FY2009 and FY2011; in the case of all four of these measures, however, the FY2011 numbers were well below the FY2008 level. The data on criminal fines and forfeitures imposed, the remaining measure, reveal no discernible pattern. More generally, the values of the various measures for the years shown seem quite small relative to the estimated size of the unauthorized alien workforce.

DOL Enforcement

While the authority to enforce the INA employer sanctions provisions rests with DHS, INA §274A does grant DOL the authority to review I-9 verification forms (see above). Under INA §274A(b)(3), employers must make completed I-9 forms available to DOL officers for inspection.

DOL has separate authority to enforce federal labor laws, including the Fair Labor Standards Act (FLSA),[30] which establishes minimum wage, overtime pay, youth employment, and other standards. The Wage and Hour Division (WHD) of the DOL Employment Standards Administration (ESA) administers and enforces the FLSA with respect to private sector workers, state and local government employees, and certain federal employees. DOL officials historically have been cautious about delving into questions of work authorization in their labor standards

[30] Act of June 25, 1938, ch. 676, as amended.

investigations because of concerns that it "might impede their ability to gain the trust of illegal aliens who may be the victims of labor violations and potential witnesses against employers."[31]

DOL and DHS signed a memorandum of understanding (MOU) on worksite enforcement in March 2011 that delineates the enforcement roles of each agency and the ways in which they will work together to further their respective missions.[32] The MOU summarizes the importance of enforcing worksite-related labor and immigration laws, as follows:

> Effective enforcement of labor law is essential to ensure proper wages and working conditions for all covered workers regardless of immigration status. Effective enforcement of immigration law is essential to protect the employment rights of lawful U.S. workers, whether citizen or non-citizen, and to reduce the incentive for illegal migration to the United States.

The MOU seeks to avoid conflicts in the worksite enforcement activities of DOL and DHS. As part of the MOU, ICE agrees *not* to conduct civil worksite enforcement activities at a worksite that is the subject of an existing DOL investigation of a labor dispute, except as specified. A *labor dispute* is defined in the MOU as a dispute between employees and managers/owners over employee rights, including the right to be paid the minimum wage, a promised or contracted wage, or overtime; the right to work in a safe workplace; and the right not to be subject to unlawful discrimination. Under the MOU, ICE can conduct worksite enforcement activities during a pending labor dispute in certain circumstances, such as when the Director of ICE determines that the enforcement activity is independently necessary to further an investigation concerning national security, the protection of critical infrastructure, or other federal crimes.

ICE and DOL also agree as part of the MOU to work together to prevent manipulation of the enforcement process. To this end, ICE agrees to act to "thwart attempts by other parties to manipulate its worksite enforcement activities for illicit or improper purposes." DOL agrees to assist ICE in these efforts by sharing relevant information.

Compliance Activities in Low-Wage Industries

While DOL's direct role in immigration-related worksite enforcement is quite limited, some maintain that the agency helps reduce unauthorized employment indirectly through its enforcement of labor laws. This argument is premised on the belief that many employers who employ unauthorized aliens also violate labor laws. A 2007 paper by Georgetown University's Institute for the Study of International Migration (ISIM) notes that employers have different propensities to hire unauthorized workers, and describes a category of employers that "knowingly hire[s] unauthorized workers to exploit their labor." According to the paper, "such employers may pay salaries in cash, failing to pay their share of social security taxes; and they may seek unauthorized workers because they are less likely to complain about ill treatment."[33] Thus, with respect to unauthorized employment, enforcement of minimum wage, overtime, and other

[31] B. Lindsay Lowell, Susan F. Martin, and Micah N. Bump, *Worksite Solutions to Unauthorized Migration*, Institute for the Study of International Migration, Georgetown University, October 2007, p. 12 (hereafter cited as *Worksite Solutions to Unauthorized Migration*).

[32] The MOU is available at http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf. This MOU supersedes a 1998 MOU originally signed by ESA and the Immigration and Naturalization Service of the Department of Justice.

[33] *Worksite Solutions to Unauthorized Migration*, p. vi-vii.

statutory requirements may serve as a means of reducing the economic incentives to hire unauthorized workers and thus result in decreased demand for these workers.

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

> I know firsthand that many employers who comply with other labor standards still hire the undocumented. Many businesses pay the minimum wage and have barely tolerable working conditions because there are sufficient undocumented workers willing to accept those terms. If we care about low-income workers in this country, we need to create pressure to improve their economic condition by reducing the supply of unauthorized workers.[34]

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

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

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

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

Table 7 provides data on low-wage industry cases and back wage collections for FLSA overtime and minimum wage violations for FY2003-FY2008. As shown in **Table 7**, the number of cases in low-wage industries generally decreased between FY2003 and FY2008. Despite this general

[34] Maria Echaveste, "Target Employers," *American Prospect*, October 23, 2005, http://www.prospect.org/cs/articles?article=target_employers#.

reduction in cases, however, back wage collections increased throughout the period. In addition, when considered in the larger context of the potential number of employers in these low-wage industries that may be violating FLSA requirements with respect to unauthorized workers, or workers generally, the numbers in **Table 6** and **Table 7**, as in the ICE data tables, can seem quite small.

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

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

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

Conclusion

It remains to be seen whether the worksite enforcement strategy unveiled by DHS in 2009—with its focus on employers who knowingly employ unauthorized aliens—will result in increases in Final Orders, administrative fines, administrative and criminal arrests, criminal indictments and prosecutions, and criminal fines in the coming years. More broadly, it can be argued that the ultimate test for this strategy or any other approach to worksite enforcement by DHS or DOL is whether it helps reduce the size of the unauthorized labor force in the United States.

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