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Jason Korosec

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EMPLOYERS BEWARE: THE I-9 FORM: VERIFYING IDENTITY AND IDENTITY DOCUMENTS IN THE EMPLOYMENT CONTEXT

Jason A. Korosec^{*}

I. IT ISN'T WHAT YOU KNOW, IT IS WHO YOU KNOW

This common refrain now has darker connotations in the post 9/11 environment. After all, there is no straightforward litmus test to determine whether any individual is a terrorist, supports terrorism, funds terrorism, or is likely to participate in a terrorist attack.¹ Race, national origin, and religion do not appear to be accurate predictors of potential terrorism.² The lack of any obvious external visual cues of a potential terrorist-in-our-midst creates general discomfort for many people.

After 9/11, the government announced that a public-private partnership was necessary to effectively combat terrorism.³ One facet of this partnership is an employer's responsibility to know the activities of its

^{*} Adjunct Associate Professor of Law, Case Western Reserve University School of Law; Vice President and Director, Citishare Corporation; and, Chief Executive Officer, EagleCheck, Ltd. B.A. 1990, University of Rochester; J.D., M.B.A. 1997 Case Western Reserve University. The views expressed in this paper are entirely my own and do not reflect the views of any of my employers or any other person or entity.

1. See *Timothy McVeigh: Convicted Oklahoma City Bomber*, CNN.com, Mar. 29, 2001, <http://archives.cnn.com/2001/US/03/29/profile.mcveigh/> (last visited on May 12, 2005) (giving a background on Timothy McVeigh; note that there are no obvious visual cues that McVeigh intended to both take innocent human life and destroy the Alfred P. Murrah Federal Building in Oklahoma City); Amos Guiora, *Counterterrorism and Employment: An Israeli Perspective*, CASE STUDIES RESEARCH PAPER SERIES IN LEGAL STUDIES No. 05-26, 4 (Aug. 2005), available at <http://ssrn.com/abstract=785368> (describing an account of Mordachi Vanunu, an alumnus of the IDF who, in the eyes of many, committed treason in sharing Israeli state secrets).

2. See USA Patriot Act, Pub. L. No. 107-56, § 102, 115 Stat. 272, 276-77 (2001) (condemning discrimination against Arab and Muslim Americans).

3. See Andrew P. Morriss, *The Public-Private Security Partnership: Counterterrorism Considerations for Employers in a Post-9/11 World*, 2 HASTINGS BUS. L. J. (427), (2006) (explaining the public-private partnership, and its foundations in the war on terrorism).

employees and customers.⁴ Given the number of 9/11 terrorists who had acquired (or faked) driver's licenses,⁵ issues inherent in identity and documentation of identity require the attention of employers.

In this paper, I explore one aspect of knowing your employees—specifically, the verification of identity and its importance. An overview of identity and the sources of identity documentation are reviewed in connection with the minimum and maximum federal requirements for the verification of employment eligibility. The eligibility verification process is useful in discussions about the identity verification process because many employers inspect and attempt to verify identity documents to determine employment eligibility.

II. IDENTITY VERSUS IDENTITY DOCUMENTS

A person's identity is often confused with the documents that support an assertion to or a claim of identity. Only the person claiming an identity knows if that identity truly belongs to that person.⁶ Therefore, to avoid tautological and proof problems, society relies on various documents that support a claim to specific and ideally unique identity.

Despite the difficulties with identity, unless challenged, our legal system assumes that documented identity and actual identity are one and the same.⁷ In many circumstances, reliance on this assumption may be quite misplaced and troublesome.

4. See USA Patriot Act, Pub. L. No. 107-56, §§ 301-377, 115 Stat. 272, 296-342 (2001) (expanding the scope of power and responsibilities of companies in certain industries to understand the activities of customers and potentially employees, particularly around money laundering).

5. See EagleCheck Improves Security and Helps Prevent Terrorism, <http://www.eaglecheck.com/Preventing/Preventing.htm> (visited on June 26, 2006) (listing the 9/11 terrorists utilizing some form of assumed identity).

6. Even that person may not know that they are not who they claim to be.

7. Recent cases on identity theft that examine claimed identity and documented identity closely are exceptions. Such examinations arise from a claim under 42 U.S.C. § 1983 (civil action for deprivation of rights). See Luke Klinker, Note, *Hill v. Scott: The Eighth Circuit Upholds the Basic Principles of the Objective Reasonableness Standard in a Case of Mistaken Identity Arrest*, 38 CREIGHTON L. REV. 691 (2004-2005). See e.g., *State v. Gramlich*, 2005-Ohio-503, 2005 WL 315317 (Ohio App. 8 Dist., Feb. 10, 2005) (noting how defendant-appellant Gramlich utilized her roommate's identity to avoid traffic ticket).

A. IDENTITY MARKERS

In analyzing identity, core identity and documentation of that identity may become quite philosophical or even religious.⁸ After all, who am I? Who are you? For purposes of this review, identity is comprised of the unique set of identity markers and attributes. These identity markers define a person as a particular, specific, and unique person. Identity markers do not typically change, or at least do not change often.

Some identity markers are physical in nature. Height, weight, eye color, hair color, gender, and race are examples of physical identity markers. None of these are unique to an individual. That is, more than one person may be the same height or weight. As these physical attributes are combined, there are fewer and fewer people who would precisely match. There are a few physical identity markers that are thought to be unique; like a fingerprint,⁹ retina pattern, or DNA markers.

Other identity markers are relational to key events or rites of passage in a person's life. For example, a person's date of birth is an identity marker that defines a person, uniquely, from the time of that person is born. The name assigned to that person is another component of that person's identity. A person's anniversary date defines a person, in terms of the date of marriage. Each of these other identity markers, by themselves, are not unique, because more than one person may have the same name, or be born or married on the same day. However, as identity markers are combined, there are fewer and fewer individuals who will have the same combination of identity markers.

8. See Pastor Kevin Lea, *The Coming National ID Card: Will it be the Mark of the Beast?*, <http://www.raptureready.com/soap/rr-id.html> (visited on May 12, 2005) (discussing whether identity documentation and national identification cards invoke biblical signs of the end of the world).

9. But see, Susan Schmidt and Blaine Harden, *U.S. Frees Oregon Lawyer Jailed in Madrid Bombings*, WASH. POST, May 21, 2004, at A6 (reporting an account of an Oregon lawyer whose fingerprints actually matched a bag utilized in the Spanish train bombing; this scenario led to questions about whether fingerprints were actually unique, at least with respect to how these fingerprints are stored in the computer); Al Goodman, *Spain Hunts 'Detonator Bag' Man*, CNN.com, May 28, 2004, <http://edition.cnn.com/2004/WORLD/europe/05/28/spain.warrant>; David Massey, *Justice Investigating Case of Lawyer Detained over Fingerprint Mistake*, USA TODAY, 9/13/2004, http://www.usatoday.com/news/washington/2004-09-13-justice-abuse_x.htm.

Many government records of identity markers are also referred to as Vital Records.¹⁰ Records of identity markers are documented key life events or rites of passage and some records are byproduct documents of various government interactions.

B. IDENTITY DOCUMENTATION: LIFE EVENTS OR RITES OF PASSAGE

Many identity markers are documented through key life events or rites of passage in life. For example, a birth certificate accompanies a birth. That birth certificate typically documents various identity markers associated with a birth, including the names of the parents, the child's name, date of birth, gender, race, eye color, and more. Similarly, a baptismal certificate documents a baptism event, along with other identity markers. A death certificate documents potentially the last rite of passage in life: death.

Many of these key life events or rites of passage result in documents that may later be utilized to support a claim to identity or as input to securing a secondary identity document.

C. IDENTITY DOCUMENTATION: GOVERNMENT INTERACTIONS

Other identity markers are documented as a byproduct of interactions between individuals and government. Some interactions are government grants of certain benefits and others are permissions (or licenses).

A social security number¹¹ is granted to an individual to track and allocate certain government benefits, including a tax deduction that parents may take for registered children,¹² payments into a retirement scheme, and various other social welfare programs.¹³ The Social Security Card is a piece of paper that has a person's name and assigned number.

10. See e.g., Connecticut Department of Public Health, State Office of Vital Records, http://www.dph.state.ct.us/PB/HISR/Vital_Records.htm (last visited on May 12, 2005) (explaining how to access Connecticut Vital Records, including birth records, marriage records, and death records).

11. In the I-9 process, a Social Security Card documents a person's citizenship because a card may only be properly issued to a citizen of the United States.

12. See 2005 1040 Instructions, Line 6c, Column 1, page 19 (explaining the IRS requirements for a deduction for a dependent, including the requirement for a Social Security Number).

13. See Social Security Online, Social Security Number Policy Chronology, <http://www.ssa.gov/history/ssn/ssnchron.html> (last visited on May 12, 2005) (giving a history of the Social Security Number, including the government's expanding usage of it).

Likewise, a driver's license is granted to a specific individual to authorize (or license) that individual to operate an automobile on public roads.¹⁴ To ensure that the license is specific to a person, it also contains certain identity markers, including name, address, and a photograph of the individual.¹⁵ Driver's licenses vary from jurisdiction to jurisdiction, but are generally laminated paper printed by a computer.

A U.S. passport is granted to an individual to permit them to travel outside of or to re-enter the United States.¹⁶ A U.S. passport has relatively few identity markers, including name, nationality, date of birth, gender, place of birth, and a photograph.¹⁷ A passport is a high quality document with a variety of security features that make it much more difficult to forge.

A voter registration card is granted to citizens who have registered to vote in a particular precinct. Such a card generally has a name, address, and a voting district or precinct. Although these cards vary from jurisdiction to jurisdiction, they are also typically typewritten text on paper.

A selective service card is provided to male citizens over the age of 18 to prove that the person registered with the military for a potential draft into the armed forces. These cards are typically postcards that are typewritten text on paper.

There are many other types of cards and documents that contain identity information that are created as a result of an interaction with government.

D. IDENTITY DOCUMENTATION: PRIVATE INTERACTIONS

Other identity markers are documented as a result of private interactions in the normal course of the economy. There are numerous examples of such identity documents.

14. *See e.g.*, Ohio Rev. Code Ann. § 4507.01(A) (Anderson 2006) (defining the purpose of a driver's license).

15. *See e.g.*, Ohio Rev. Code Ann. § 4507.13(A) (Anderson 2006) (defining information included on, and format of, a driver's license).

16. *See* 8 U.S.C. § 1185(b) (2000) (setting forth the general rule that citizens of the United States may not exit or enter the United States without a passport). *See also* 8 U.S.C. § 1101(30) (2000) (defining a passport as a travel document that shows the bearer's identity).

17. *See* ISO 7501 (setting forth an international standard for machine readable travel documents).

Financial institutions grant credit cards to individuals. These credit cards typically represent a revolving line of credit. To issue such a card, financial institutions seek out credit worthy consumers for the specific purpose of extending an unsecured line of credit to an individual consumer. As inputs to the process and byproducts of the process, various identity markers are captured and documented. For example, a financial institution may request a social security number, birth date, employer's name, home address, income, and more. The purpose of collecting these identity markers is to ensure that the financial institution is granting credit to a specific individual who is credit worthy.

Likewise, an airline provides a frequent flier card to track and reward certain consumer travel behavior, specifically to increase that consumer's business with a particular airline or its affiliates. And, in so doing, the airline captures additional identity markers. These identity markers may include a name, address, travel habits (actual and forecasted), credit card information, passport number, and more. These identity markers are collected to enable a hassle free travel experience, as well as to ensure that their rewards are truly awarded to the correct person.

Likewise, a corporation may issue a corporate identity card to enable an employee to physically access certain facilities, parking, and sometimes certain computer systems necessary to perform their duties. In so doing, the company is likely to capture and track certain identity markers, including a photograph, name, and various physical and virtual access permissions.

E. FLAWED PREMISES LEAD TO FLAWED RESULTS

Laws and regulations are generally based on actual identity rather than documented or claimed identity. When identity is a key element of a regulation, then documented identity becomes important to that regulation. Confusing actual identity with documented or claimed identity could lead to unexpected or undesired results. Unfortunately, unless challenged in the enforcement process or the authority delegation process, government processes simply rely on the documents associated with identity.

The remainder of this paper will explore the identity verification requirements associated with employment authorization verification in the United States.

III. OBLIGATION TO VERIFY IDENTIFICATION DOCUMENTS

Employers must verify identification documents prior to or concurrently to hiring a new employee. To avoid civil and criminal liability associated with hiring an unauthorized person, employers utilize the I-9 form, and attest to an examination of various documents.

It is unlawful to hire, recruit, refer, or continue to employ individuals who are not permanent residents or authorized to work in the United States (unauthorized aliens).¹⁸ Indeed, any person that knowingly hires ten or more unauthorized aliens is subject to fine and a potential jail term.¹⁹ Notice the focus on actual identity, specifically individuals who are not permanent residents.

This rule does not address the difference between actual identity and documented identity. An employer may not know who is actually authorized to work in the United States. Likewise, an employer may not know who is a permanent resident and who is a natural born citizen. Therefore, Congress set forth a defense to a charge under this act. Specifically, employers who adopt the Employment Verification System have a defense to any charges under this law.²⁰

The Employment Verification System is a process-based approach, with the goal of verifying and attesting to documented identity. The process ensures that a prospective employer has reviewed the identification documents presented by a prospective employee. The principle underlying the system is that an unauthorized alien will not have these documents or documents that are passable as legitimate identification. The Employment Verification System therefore requires the employer to physically inspect documents that establish identity and work authority and attest to that inspection²¹ on a form proscribed by the Attorney General.²²

18. See 8 U.S.C. § 1324a(a) (2000) (setting forth the rule against employment of unauthorized aliens).

19. See 8 U.S.C. § 1324(a) (2000) (setting forth the penalty for knowingly employing unauthorized aliens).

20. See 8 U.S.C. § 1324a(b) (2000) (setting forth the Employment Verification System).

21. See 8 U.S.C. § 1324(b)(1)(A) (2000) (setting forth the requirement to inspect and attest to inspecting documents that establish identity and work authority).

22. See I-9 Form.

The Attorney General implemented the act by requiring an I-9 form to be completed according to the Department of Justice's instructions.²³ These regulations have been extended to utilizing labor through contracting or sub-contracting.²⁴

IV. RELIANCE PROBLEMS WITH IDENTITY DOCUMENTATION

The Employment Verification System—or, more simply, the I-9 form—appears to be a reasonable approach to verifying a particular individual's authority to work. This is particularly true given the difficulties that stem from the distinction between actual and claimed identity.

Indeed, at the most straightforward level, the I-9 form requires a prospective employee to provide approved identification and attest that it is real. And, in turn, the employer (or an agent) attests that the employee's identification was viewed and it appeared authentic. The I-9 form is not forwarded to the government, but rather it remains on file with the company for later inspection.

A double attestation approach may be reasonable in many situations. However, documents that support a claimed identity are subject to a variety of different kinds of frauds that may prove fatal to their veracity, even under a double attestation approach.

A. OUTRIGHT DOCUMENT FORGERY

As previously described, three kinds of events result in documentation of an assertion of identity: rites of passage, government interactions, and private interactions. The documents that accompany these events are of various levels of sophistication and simplicity.

1. Easiest to Forge

The typical birth and baptismal certificates are pieces of paper with a variety of informational fields. These pieces of paper document a rite a passage (birth, baptism). Some birth certificates have a seal and some do not. Birth certificates and baptismal certificates both capture certain identity markers that support a person's claim to an identity.

23. See 8 C.F.R. § 274a.2 (includes the implementing regulations).

24. See 8 C.F.R. § 274a.5 (extending employment regulation to subcontractors).

A social security card, particularly one issued during the first thirty years of the program, is a simple piece of paper with a number and name. Lamination is prohibited on some cards. A social security number never changes, even if the number is compromised. And, there is no requirement for older social security cards to be replaced.

The typical voter registration card documents the residency and eligibility of an individual to vote. The typical voter registration card is a mass-produced un-laminated piece of paper that sometimes doubles as a postcard sent through the mail. The card is typically produced in a simple courier typeface. A voter registration card also should only be issued to a citizen.

The Selective Service Registration card documents that a male US Citizen has registered with the U.S. military for possible obligatory service with the military. These cards are also simple paper-based postcards that are sent through the mail.

Each of these documents are just text printed on paper. Any person with basic literacy in Microsoft Word and a laser printer could create documents that would visually appear to be authentic (the required standard for the I-9). The I-9 process is just a paper filing process. There is not any information technology automation, electronic verification, or web entry available for employers to double-check submitted documents. Therefore, with the easy-to-forged documents, a prospective employee could render the I-9 process useless.

2. Moderately Easy to Forge

State governments issue driver's licenses to document the authority of a specific individual to operate an automobile on public roads and to track violations of the motor vehicle code of that and other states. In licensing an individual to drive, the state government typically issues a laminated piece of paper with a photograph. There are some security features of these documents that the average student with Microsoft Word and a laser printer could not duplicate.

3. More Challenging to Forge

The U.S. government issues a passport to specific individuals to provide the authority to travel under the protection and sanction of the U.S. government internationally. The passport has many security features that have raised the difficulty level of compromising the document. Nonetheless, I conjure that this document could be forged, as well.

4. *Forgeries in General*

In today's environment, forgeries are real possibilities for many reasons.²⁵ Document production technology is relatively inexpensive and within reach of a significant percentage of the population. So, fictional documents certainly look and feel authentic, particularly to the untrained viewer of the document.

Modern document based technologies, like micro-printing, holograms, special inks, special papers, and the like, are not widely utilized in identification and citizenship documents. These document-based technologies are much more difficult to fake with inexpensive technology.

And, back-end technology-based verification systems are immature in the document verification venues. If available, such a system could verify that the information contained on a presented document, at least matched the information stored in a central system.

B. REAL DOCUMENTATION OF A FICTIONAL PERSON

Unfortunately for employers, they won't be dealing with just completely fake documentation of identity and citizenship. A prospective employee may utilize forged documentation (described above) with a government agency to secure real identification of a fictional (created) person. This real documentation of a fictional person would be submitted by that prospective employee and reviewed by the prospective employer in the I-9 completion process. The I-9 paper driven process will successfully conclude, because the documents of identity submitted will be real, albeit of a fictional person.

25. See Matthew McClearn, *Making Money*, CANADIAN BUS., Aug. 2004, http://www.canadianbusiness.com/shared/print.jsp?content=20040830_61496_61496 (last visited on May 13, 2005) (containing a storybook style account of how Wesley Weber, a twenty-something, managed to forge insurance certificates, welfare cards, personal checks, imitation gift certificates, and later, nearly successfully circulating millions in Canadian currency); see also, FRANK W. ABAGNALE, *CATCH ME IF YOU CAN: THE TRUE STORY OF A REAL FAKE* (containing an entertaining true story of an individual experienced in various forms of document fraud. Some of the frauds explained include fraudulent corporate identification, fraudulent pilot's licenses, fraudulent licenses to practice medicine and law, fraudulent checks, and fraudulent forms of identification, and more); SHELDON CHARRETT, *THE MODERN IDENTITY CHANGER: HOW TO CREATE A NEW IDENTITY FOR PRIVACY AND PERSONAL FREEDOM*, (a how-to book on creating a new identity).

In these cases, the source documents are referred to as breeder documents because each document that is relatively easy to fake enables its holder to secure real government issued documents. In this sense, these source documents breed new documents.

In a very mechanical way, the prospective employee would create a fictional set of documents (as described above), possibly including a birth certificate, voter's registration card, or other such core document. These documents could then be presented to a Motor Vehicles agency to secure a real driver's license. Along with other identification, the real driver's license could be submitted to secure a real passport. In effect, the original fictional documents could potentially breed a variety of real, government issued identifications (with all of the relevant security features). In these cases, real documentation of identity would be complete fiction.

C. ALTERNATIVE REAL IDENTITIES

Again, unfortunately for employers, fake identification and real identification of a fictional person are not the only problems to be handled in the standard I-9 process. Instead of going to the trouble of creating real looking, fictional documents to secure real documents, the prospective employee could simply utilize real documents in the process. These real documents could all be legitimate but represent another person entirely.

Consider that most documentation of identity does not contain a photograph of the individual represented. For example, a birth certificate, social security card, Native American tribal documents, and others are simple pieces of paper. These real documents (belonging to someone else) may be utilized to secure documents with a photo, fingerprint, or any other documentation of identity. After this process is completed, in effect, the person would then have an alternative real identity, just one that did not belong to that prospective employee.

All of these documents could be submitted to the prospective employer in the I-9 completion process without the employer detecting the problem.

D. REAL DOCUMENTATION OF AN UNAUTHORIZED PERSON

It may seem trite by comparison to the above possibilities of document fraud, but the prospective employee could simply provide real identification and not be authorized to work in the United States. If this occurred, and the employer still permitted the prospective employee to work, the employer (or its agent) probably did not correctly and accurately complete the I-9 form.

E. LIMITS ON IDENTIFICATION DOCUMENT VERIFICATION AND INVESTIGATION

Employers who understand the realities of documented identity might be interested in conducting a more rigorous examination of a prospective employee prior to hiring.

Unfortunately for those employers, for the purposes of employment, an employer is specifically prohibited from conducting more extensive verification than the document verification specified on the I-9 form.²⁶ Indeed, going further than the I-9 form may result in civil and criminal liability.

The general rule is that it is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual because of his or her citizenship status or national origin.²⁷ While this general rule appears to be fair, the Immigration Act of 1990 added that

A person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).²⁸

In effect, this provision of the act and the wording on the I-9 form itself,²⁹ along with the official instructions for the I-9 form,³⁰ created a strong disincentive to do anything but blindly and mechanically complete the form.

26. See 8 U.S.C. § 1324a(b) (2000).

27. 8 U.S.C. § 1324b(a)(1) (2000).

28. 8 U.S.C. § 1324b(a)(6) (2000).

29. See I-9 form, OBM No. 1115-0136, Employment Eligibility Verification, Anti-Discrimination Notice, "Employers CANNOT specify which document(s) they will accept from an employee."

30. See Handbook for Employers, Instructions for Completing Form I-9, U.S. Department of Justice, Immigration and Naturalization Service, M-274 at 8. Employees can choose which documents they want to present from the lists of acceptable documents. An employer cannot request that an employee present more or different documents than are required or refuse to honor documents which on their face reasonably appear to be genuine and relate to the person presenting them. An employer cannot refuse to accept a document, or refuse to hire an individual because a document has a future expiration date.

Indeed, the Question and Answer section of the government-published Handbook for Employers creates disincentives for heavily investigating the background of a potential employee:

Question: What happens if I properly complete a Form I-9 and INS discovers that my employee is not actually authorized to work?

Answer: You cannot be charged with a verification violation. You will also have a good faith defense against the imposition of employer sanctions penalties for knowingly hiring an unauthorized alien, unless the government can show you had actual knowledge of the unauthorized status of the employee, if you have done the following:

- Ensured that employees fully and properly completed Section 1 of the I-9 at the time employment began;
- Reviewed the required documents which should have reasonably appeared to have been genuine and to have related to the person presenting them;
- Fully and properly completed Section 2 of the I-9, and signed and dated the employer certification;
- Retained the I-9 for the required period of time; and
- Made the I-9 available upon request to an INS, DOL, or OSC officer.³¹

The bottom line is that the law does not structure incentives to an employer to find out the veracity of a potential employee's assertion. Just the opposite: the incentives are designed to ensure that the form is properly completed and that the employer doesn't have actual knowledge that the potential employee is an unauthorized alien.

F. OSC INVESTIGATES ZEALOUS EMPLOYMENT VERIFICATIONS

The completion of forms for the sake of completing forms is not the ideal approach to vetting employees. The regulations are not limited to the accurate completion of the I-9 form. Rather, they provide further disincentives to zealous verification of employment authorization status, citizenship, or identity.

31. *Id.* at 13.

The Department of Justice has an organization to investigate and fine companies that request more thorough or thoughtful investigations of a prospective employee's identity for the purposes of the I-9 form. This organization is known as the Office of Special Counsel for Immigration Related Unfair Employment Practices or OSC.³² They have a website for complaints and investigations.³³ As of the time this article was written, the OSC touts their prosecution of Crystal Care Center, of Crystal, Minnesota for challenging the presentation of an unrestricted social security card and driver's license of a Liberian refugee on the front page of OSC's website.³⁴ Crystal Care Center was fined \$500 and was ordered to pay \$2,881 in back pay to the Liberian refugee.³⁵

Knowing the extent and ease of document fraud, this prosecution approach will probably lead to a more blind approach to completing the I-9. If the identification looks good, it will undoubtedly be accepted. Otherwise, an employer who suspects and pursues a potentially unauthorized employee exposes themselves to liability as an unfair labor practice.

G. NO OTHER USE OF I-9 DATA

The law and associated regulations also prohibit utilizing information collected on an I-9 for any purpose beyond determining whether an individual is an unauthorized alien through the Employment Verification System.³⁶ The I-9 form requires a name, address, city, state, zip, maiden name, date of birth, Social Security Number, employee attestation and signature, copies of documents, and an employer's attestation and signature.³⁷

Despite the prohibition on using the form or any data contained on it, in common practice, this information is regularly utilized in the course of employment. For example, a social security number is utilized to withhold taxes from an employee's paycheck. Likewise, the name of the employee

32. The OSC was established under the authority of 28 C.F.R. § 0.53 (1997); *see also*, The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 102, 100 Stat. 3359, 3374-76 (1986); 8 U.S.C. § 1324b(b) (2000).

33. *See* Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), <http://www.usdoj.gov/crt/osc/> (last visited May 13, 2005).

34. *Id.*

35. *Id.*

36. *See* 8 U.S.C. § 1324a(b)(5) (2000). The form and the data on the form may not be used for any other purpose, except in cases of Fraud Generally (18 U.S.C. § 1001), Fraud with Identification (18 U.S.C. § 1028 (2000)), Fraud and Misuse of Visas (18 U.S.C. § 1546 (2000)), and Prosecution of Perjury (18 U.S.C. § 1621 (2000)).

37. *See* Employment Eligibility Verification Form, *supra* note 28, Section 1-3.

is also utilized as the primary identifier in meetings. To avoid the strict prohibitions on using the data for any other purpose, most employers simply request this data from a potential employee either before the hiring process or concurrent with it.

V. EMPLOYERS' OPTIONS

In this age of terrorism, employers may want to know who is working for them. For the reasons discussed in this paper, identification verification programs are likely to be deeply flawed in terms of their ability to verify who is actually working at their workplace.

The existing legal structure places employers in a highly problematic situation. The identification documents required for an I-9 form are highly unreliable. Thus, any decision based on the I-9 alone may be fundamentally flawed. Despite the known problems with identification and citizenship documents, employers are prohibited from requiring additional proof of employment eligibility. Worse yet, employers may not investigate or attempt to verify presented documents, beyond the mechanical completion of an I-9 form. And, employers are *not* permitted to utilize the information collected on an I-9 form for any purpose other than for which it was collected.

One strategy to avoid the legal entanglements of the I-9 verification process is to complete a pre-employment background check³⁸ that is completely separate and distinct from the I-9 form. When and if the employee does not have any negative background, the prospective employee is extended an offer; then, the I-9 form is completed; identification is inspected and copied; and the form is filed into the employee's file.

This approach causes many to question the value of the entire I-9 process. To this point, we turn to the Government Options.

38. There are also substantial legal requirements for pre-employment background checks and many business tactics that an employer may want to pursue to ensure that a criminal or terrorist does not end up working for them. The requirements for these pre-employment background checks are beyond the scope of this paper.

VI. OPTIONS FOR GOVERNMENT

The Attorney General has the regulatory authority to prohibit or limit the use of certain documents deemed to have lost reliability.³⁹ That authority has never been exercised, despite the extensive reasons to do so. Presumably, if the Attorney General elected to exercise this power with respect to easily forged, falsified, or unverifiable documents, there would be no or few documents eligible for use with the I-9 form.

Even though no solution is fool proof, the government does have some other longer-term options to begin to address the issues associated with identity verification.

A. APPLICATION VERIFICATION

The application process for any of these documents could be greatly strengthened. In some states, the minimum identity documentation standards for securing a driver's license are very low. Some states accept a utility bill. Other states accept the sworn statement of another individual.

The documentation required to secure another form of identification could be greatly strengthened. Congress recently started to take some modest steps to enhance and standardize the driver's license issuance (and application) process.⁴⁰

A more useful approach would be to uniformly require a verification process prior to issuance or usage of *any* document usable for identification purposes.⁴¹

B. REAL-TIME IDENTITY DOCUMENT VERIFICATION

A real-time verification technology system could be implemented, in a way similar to the credit card industry's approach, to verify that the

39. See 8 U.S.C. § 1324a(b)(1)(E) (2000) (providing that the Attorney General may prohibit or restrict the use of certain forms of identification).

40. See Real ID Act of 2005, H.R. 418, 109th Cong. §§ 202(b), (c) (2005). At the time of publication, only the U.S. House of Representatives had passed this act. The proposed act set forth a minimum standard for a driver's license, including what appears on the license and what documents may be utilized to secure a license. Since all of the required documents are relatively easily forgeable, the Real ID Act of 2005 may not actually prevent identity fraud. A full discussion of the benefits and drawbacks of the Real ID Act of 2005 is beyond the scope of this paper.

41. To be useful, this requirement would need to hold for all such documents; i.e., Birth Certificates, Baptism Certificates, Selective Service Registration Card, Voter Registration Card, Driver's Licenses, Passports, and the like.

document is indeed on file with the government.⁴² A good deal of fraud could be detected with basic information technology-based verification of information. Unfortunately, there is no systematic information technology system behind the I-9 form. That is, the form is not an interactive technology system that catches errors, omissions, other mistakes or intentional fraud. Rather, the I-9 form is just that, a paper form that is filed away in the employer's employee records.

The government is making some inroads. One promising pilot program is known as the Electronic Verification System (EVS). The Social Security Administration (SSA) is piloting automated social security number verification services.⁴³ However, these services are strictly limited to verification only. SSA has set forth a specific policy prohibiting the misuse of EVS:

SSA will advise you if a name/SSN you submitted does not match our records. This does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against an individual who appears on the list. EVS should only be used to verify currently or previously employed workers. Company policy concerning the use of EVS should be applied consistently to all workers, e.g. if used for newly hired employees, verify all newly hired employees; if used to verify your data base, verify the entire data base. Any employer that uses the information SSA provides regarding name/SSN verification to justify taking adverse action against an employee may violate state or federal law and be subject to legal consequences. Moreover, this makes no statement about your employee's immigration status.⁴⁴

Based on this legal policy, this EVS approach to verification is not intended to be an extension of the I-9 form and the work authorization verification.

42. Centralization is unnecessary to accomplish this end. Also, there will always be potential problems with the first or initial documentation(s) of identity. Both of these points merit a full explanation, and are beyond the scope of this paper.

43. See Social Security Administration, Social Security Number Verification, *available at* <http://www.ssa.gov/employer/ssnv.htm> (last visited June 26, 2006) (but note that this service is *neither* offered as an identity verification process nor as a component to the I-9 form).

44. See Social Security Number Verification System Handbook, *Proper Use of SSNVS*, *available at* http://www.ssa.gov/employer/ssnvs_handbk.htm (last visited June 26, 2006).

C. REPORTING IDENTIFICATION DOCUMENTATION USAGE TO OWNER

Another option for the government to improve identification verification would be to report access and usage of identification documents to its owner or subject. Today, when a copy of a government record is utilized or accessed, that use, copy, or access is not typically reported to the owner of that document. For example, if a third party accesses a copy of a birth certificate, that access is not reported to the person who is the subject of that birth certificate (its owner).

This type of reporting regularly occurs in other industries. For example, when a credit card is utilized to purchase goods, that usage is reported to the consumer cardholder. By reporting it to the consumer cardholder, the consumer may immediately report an unauthorized use back to the issuer. Since document accesses are not reported back to the subject of the document, particularly when a duplicate is made, the subject of that document is not able to inform the authorities about potential malfeasance that could become the basis of various forms of identification fraud, described above.

D. TIE IDENTIFICATION DOCUMENTATION BACK TO SPECIFIC AND UNIQUE PERSON

Perhaps the most controversial issue is that documentation must be tied back to a specific and unique individual. Without such a link, another person may illegitimately utilize legitimately issued identification (i.e. not the true person). This problem undermines all identification because legitimate identification becomes automatically suspect.

Today, the only way to create this tie is with biometrics, including a fingerprint, retinal pattern, DNA markers, hand geometry, and others. As discussed above, these biometrics may not be as unique as pitched and therefore using them, may not tie the identification document back to a specific and unique individual.

The converse is also true. An individual should only be entitled to have one of any particular document. The holding of multiple of the same identification documents, potentially with different identities is one source of a potential assumption of another identity.⁴⁵

45. See 22 C.F.R. § 51.2(b) (1981) (prohibiting any person from holding more than one valid US Passport at any one time). See also O.R.C. Ann. § 4507.02(A)(2) (2005) (prohibiting any person from having more than one valid driver's license, from any recognized jurisdiction, at any one time).

E. FOOLPROOF?

None of these three approaches will fix every loophole. However, these approaches add substantial meaning to the identity verification process. I examine each, briefly, to understand what would be required to truly verify identity and not just examine and accept identification documents.

F. A WORD ABOUT PRIVACY AND DOCUMENTED IDENTITY

There are many privacy advocates who assert that the government should not be involved in identity and identity management at all.⁴⁶ And, the government options for enhancing identity verification are serious intrusions on an individual's privacy and freedom in society. Indeed, the common vernacular is that we do not want to live in a society that requires papers or internal passports to conduct every transaction.⁴⁷

These considerations are outside of the full and primary scope of this analysis. However and very briefly, to validate such concerns, we need to consider why identity is important in our society. After all, identity by itself is meaningless to security.⁴⁸ The answer to the "why utilize identity" question is relatively simple.

Our society grants certain benefits to certain individuals that meet certain criteria. In many situations, that criteria is comprised of identity and certain identity markers. So, to validate that the criteria is met, identity and the related identity markers must be validated in conjunction with other qualifying criteria so as to release that government benefit to the right person.⁴⁹

46. This paper takes no formal position on a national identification card or even state-issued identification cards. Rather, this paper only sets forth the elements of a system that would have real meaning. Contrast that with the current rote form completion process (the I-9 form).

47. "Papers Please" is the common refrain that sarcastically references the old permission-based totalitarian societies. *E.g.* ROBERT O'HARROW, JR., *NO PLACE TO HIDE* (2005) (describing the potential for a big brother society when data and systems drive decision making). *See generally*, JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* (discussing the proper balance in preventing future terrorist attacks); BRUCE SCHNEIER, *BEYOND FEAR* (discussing security enhancing and security weakening measures).

48. Notwithstanding the linkage between identity and identity attributes, discovery of a false identity immediately raises concerns about what an individual might be hiding from an employer.

49. Some examples where identity plays a key role in the government-sponsored benefit include: the tax deduction for dependents, retirement benefits, healthcare benefits for the poor and the aged, prescription drug benefits for the aged and unemployment compensation, among others.

Similarly, our society prohibits certain activities of individuals that also meet certain criteria. Again, these criteria are often directly related to identity and certain attributes associated with identity. Validation of identity and these attributes are absolutely essential prior to enforcing certain prohibitions or penalizing an individual for violations of certain prohibitions.⁵⁰

Whether these benefits and prohibitions are rational is beyond the scope of this analysis. What is certain, however, is that these benefits cannot be awarded and these prohibitions cannot be enforced without the active management of identity. One option for those that would prefer to be anonymous in society is to completely forgo government benefits or advocate their repeal. Likewise, these individuals must advocate the dismantling of government restrictions that also demand management of identity.

VII. CONCLUSIONS

The technical problems with identity verification under current approaches will be problems for employers for the foreseeable future. Attempts by the government to resolve these issues will meet resistance from both privacy advocates and liberty defenders.

Understanding the issues with the current state of documentation of identity will enable employers to make more informed decisions about who they are hiring, particularly if the analysis is completed prior to the hiring decision.

For the time being, the I-9 form and associated process will serve little preventative value for an organization, other than enabling it to escape liability with a defense to the situation of actually employing an unauthorized worker.

50. Some examples of prohibitions that, in some way, are tied to identity include: prohibition on under-age drinking, prohibition on under-age smoking, prohibition on operating a motor vehicle on public roads without a license, and requirement to pay tax on income earned, among others.