

THE DANGEROUS INTERSECTION OF INDEPENDENT
CONTRACTOR LAW AND THE IMMIGRATION REFORM AND
CONTROL ACT: THE IMPACT OF THE WAL-MART SETTLEMENT

by
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An estimated 7.2 million undocumented immigrants are currently employed in the United States. These workers commonly find jobs in low-wage, labor intensive industries. Many of these jobs are with smaller firms that work as independent contractors to larger businesses. The intersection of the two phenomena—readily available, cheap, illegal laborers and a high demand for cheap, desperate laborers—creates a tempting opportunity for uninformed, careless, or unscrupulous employers. Perhaps emblazoned by shifting political priorities, from the Clinton Administration’s “catch and release” policy to the Bush Administration’s pledge to “return every illegal entrant we catch at the border, with no exceptions,” illegal aliens continue to find employment in record numbers in direct violation of federal laws.

To help better understand the potential for unintended violations of the Immigration Reform and Control Act and of independent contractor law, this Article investigates the responsibilities of an employer in its relationships with independent contractors to assure that workers are legally eligible for employment. Further, this Article analyzes the shifting priorities of the U.S. government in enforcing the laws on illegal workers as foreshadowed by a 2005 agreement in which the government required Wal-Mart to make an \$11 million cash payment and to accept three weighty enforcement burdens in exchange for dropping charges that Wal-Mart knowingly used independent cleaning contractors that employed illegal aliens. Finally, this Article explores the relative merits of strategies that a business can employ in efforts to balance control of its hiring practices with exposure to liability for hiring illegal aliens.

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I. THE CONTEXT

Of the estimated 11.1 million illegal immigrants currently residing in the United States, 7.2 million are employed as undocumented workers.¹ These workers, 78% coming from Latin America², find work in the low-wage, labor intensive retail and service industries, including meat packing, construction, food service, lodging, and landscaping.³ Many of these jobs are with smaller firms that work as independent contractors to larger businesses. According to the United States Bureau of Labor Statistics, total employment by independent contractors increased 1% between 2001 and 2005, to a total of 7.4% of all employed workers in the U.S.⁴

The intersection of two phenomena—readily available, cheap, undocumented laborers, and a high demand for cheap desperate laborers—creates a tempting opportunity for uniformed, careless or unscrupulous employers. Perhaps emblazoned by shifting political priorities, from the Clinton Administration's "catch and release" policy to the Bush Administration's pledge to "return every illegal entrant we catch at the border, with no exceptions," employers continue to hire illegal aliens in record numbers in direct violation of the federal laws that forbid it.^{5,6}

¹ *Illegal Immigrants Make Up 5 Percent of Work Force, Study Says*, ST. LOUIS POST-DISPATCH, Mar. 8, 2006, at A3.

² JEFFERY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* (2006), <http://pewhispanic.org/files/reports/61.pdf>.

³ Joel Millman, *Low-Wage U.S. Jobs Get "Mexicanized," But There's a Price*, WALL ST. J., May 2, 2005, at A2.

⁴ Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Contingent and Alternative Employment Arrangements, February 2005* (July 27, 2005), available at <http://www.bls.gov/news.release/pdf/conemp.pdf>.

⁵ President George W. Bush, Address at Davis-Monthan Air Force Base (Nov. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/11/20051128-7.html>; Andrea Cecil, *What Effect Are Undocumented Workers Having on the Nation's Economy?*, DAILY REC., July 23, 2004; Chris Echegaray, *Hispanic Immigrants Fill Nearly 40 Percent of New Jobs*, KNIGHT RIDDER TRIB. BUS. NEWS, May 9, 2004.

Opponents of illegal immigration point to the detrimental effect of such individuals on the U.S. economy, arguing that the presence of illegal labor prevents citizens from securing employment, thus increasing unemployment rates. For example, studies have found that households headed by illegal immigrants are responsible for roughly \$26.3 billion in government support costs while paying only \$16.0 billion in taxes.⁷ While most publications do not advocate illegal immigration, many writers who favor an easing of immigration quotas speak to the long and successful history of immigration. A prime example is that immigrants make major contributions to the nation's economic vitality as evidenced by the fact that nearly half the growth in the U.S. labor force since 1995 is due to immigration.⁸

II. THE WAL-MART SETTLEMENT AS A PRECURSOR

As a general rule, employers are not liable for the acts of independent contractors that are committed within the scope of the contract.⁹ Consequently, assuming that no special circumstances exist and that there is no specific statutory standard governing the exact area of law at issue, a contractual labor relationship with an independent contractor presents an attractive option for a corporate employer seeking to limit its liability. Although other advantages also

⁶ When the North American Free Trade Agreement went into effect in 1994, tariffs were lifted on imports to Mexico from the U.S., which caused prices on Mexican produce to drop sharply. The resulting farm losses prompted Mexican farm workers to immigrate to the U.S. In response to coinciding huge increases in illegal immigration, the U.S. Border Patrol under the Clinton Administration launched Operation Gatekeeper. It was intended to stop the illegal immigration along the traditional border crossings in Southern California. This initiative was reinforced by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which increased funding for border security and the penalties for illegal entry. Then, in 2001, the Bush Administration worked to improve the nation's relationship with Mexico by expressing a desire to cooperate on new immigration laws that would soften the restrictions making it difficult for Mexicans to work legally in the United States. By 2004, President Bush had proposed major revisions to the immigration system that would grant legal status to millions of undocumented workers who resided illegally in the U.S. James Sterngold, *Nafta Trade-Off: Some Jobs Lost, Others Gained*, N.Y. TIMES, Oct. 9, 1995, at A1; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 412, 110 Stat. 3009-546, 3009-666 to -668 (1996) (codified as amended at 8 U.S.C. § 1324a (2000)); Carla Marinucci, *Bush, Fox Meet on Mexican Migration*, S.F. CHRON., Feb. 18, 2001, at A3; Eric Schmitt, *Bush Aides Weigh Legalizing Status of Mexicans in U.S.*, N.Y. TIMES, July 15, 2001, at 1; Sara Schaefer Munoz, *Bush Seeks Safe Ground on Immigration; As White House Faces Pressure to Stem Tide of Illegals, Migrants Want Path to Citizenship*, WALL ST. J., Dec. 7, 2004, at A4.

⁷ Mary Fitzgerald, *Illegal Immigrants' Cost To Government Studied*, WASH. POST, Aug. 26, 2004, at A21; Steven A. Camarota, *A Jobless Recovery? Immigrant Gains and Native Losses*, BACKGROUNDER (Ctr. for Immigration Studies, Wash., D.C.), Oct. 2004, available at <http://www.cis.org/articles/2004/back1104.pdf>.

⁸ ANDREW SUM ET AL., FOREIGN IMMIGRATION AND THE LABOR FORCE OF THE U.S.: THE CONTRIBUTIONS OF NEW FOREIGN IMMIGRATION TO THE GROWTH OF THE NATION'S LABOR FORCE AND ITS EMPLOYED POPULATION, 2000 TO 2004 (2004), http://www.nupr.neu.edu/7-04/immigrant_04.pdf.

⁹ 41 AM. JUR. 2D *Independent Contractors* § 27 (2005).

characterize the employer-independent contractor relationship, such as the avoidance of benefit costs and the increased expertise offered by many contractors, the appeal of limited liability is undeniable.

However, a 2005 settlement involving the United States' largest retailer, Wal-Mart Stores, raises troubling questions for managers regarding the enforcement of independent contractor law as it pertains to long-standing beliefs regarding corporate responsibility for the illegal actions of independent contractors. On May 18, 2005, following a four-year investigation, the Department of Homeland Security's Immigration and Customs Enforcement Division (ICE) announced that Wal-Mart would pay \$11 million to settle a complaint stemming from the company's hiring of independent contractors that employed illegal aliens.¹⁰ Further, the settlement imposed three extraordinary requirements on Wal-Mart in that it:

- "Directs Wal-Mart to . . . establish . . . a means to verify that independent contractors are also taking reasonable steps to comply with immigration laws"
- "Directs Wal-Mart to provide . . . all of its store managers and future store managers with training regarding their legal obligations to prevent the knowing hiring, recruitment and continued employment of unauthorized aliens while complying with pertinent anti-discrimination laws"
- "Directs Wal-Mart to continue to cooperate . . . in . . . the investigation of the alleged illegal employment."¹¹

The settlement was a result of two major investigations. The first targeted cleaning contractors that were hiring aliens from Eastern Europe. In 2001, 100 of these workers were found cleaning Wal-Mart stores in four states.¹² Then, on October 23, 2003, federal agents arrested 245 illegal aliens at 60 different Wal-Mart stores in 21 states, after the workers completed their overnight cleaning shifts.¹³ ICE alleged that Wal-Mart, through the use of independent contractors,

¹⁰ Press Release, U.S. Immigration & Customs Enforcement, Wal-Mart Stores, Inc. Agrees to Pay a Record \$11 Million to ICE to Settle Nationwide Worksite Enforcement Investigation (Mar. 18, 2005), *available at* <http://www.ice.gov/pi/news/newsreleases/articles/walmart031805.htm>; Press Release, Wal-Mart Stores, Inc., Wal-Mart, Government Settle Immigration Investigation (Mar. 18, 2005), <http://www.walmartfacts.com/articles/2293.aspx>.

¹¹ Press Release, Wal-Mart Stores, Inc., *supra* note 10. A fourth, less contentious requirement "[d]irects Wal-Mart to maintain its own pre-existing program of taking reasonable steps to ensure that Wal-Mart employees are authorized to work in the United States, while complying with pertinent anti-discrimination laws."

¹² *Id.*

¹³ Editorial, *Landing the Big Fish: Feds Hooked Wal-Mart on Illegal Workers*, DALLAS MORNING NEWS, Mar. 22, 2005, at 16A; Steven Greenhouse, *Wal-Mart to Pay U.S. \$11 Million in Lawsuit on Immigrant Workers*, N.Y. TIMES, Mar. 19, 2005, at A1; Shannon McCaffrey, *Agents Arrest About 300 Illegal Immigrant Workers at Wal-Mart Stores*, KNIGHT RIDDER TRIB. WASH. BUREAU, Oct. 23, 2003.

“knowingly employed” illegal aliens in violation of the Immigration Reform and Control Act of 1986 (IRCA).¹⁴

As part of the settlement, the Department of Justice (DOJ) and ICE agreed to drop criminal proceedings against Wal-Mart and its company executives.¹⁵ The following excerpts of the settlement were made public:

- “Wal-Mart did not have knowledge, at the time the independent contractors initially were hired, that the independent contractors knowingly hired, recruited or employed [undocumented workers].”
- “Following a thorough investigation, the United States concluded that federal criminal proceedings involving Wal-Mart, its directors, officers or [associates] would not be appropriate.”
- “Wal-Mart, acting either directly or through independent contractors used by Wal-Mart, is permanently enjoined from knowingly hiring, recruiting and continuing to employ aliens who are not legally authorized to work within the U.S.”¹⁶

A literal interpretation of the settlement leads to the conclusion that Wal-Mart was cleared of wrongdoing while simultaneously being required to undertake specific responsibilities in the coming years. However, the two parties in the conflict had different interpretations of both the importance of the proceedings and implications of the settlement. Wal-Mart general counsel Tom Mars said the company agrees to “support fair enforcement of immigration laws” and is “acknowledging that our compliance program did not include all the procedures necessary to identify independent floor cleaning contractors who did not comply with federal immigration laws.”¹⁷

Assistant Secretary for the ICE, Michael Garcia, had a different take on the record settlement. “[This] case breaks new ground not only because this is a record dollar amount for a civil immigration settlement, but because this settlement requires Wal-Mart to create an internal program to ensure future compliance with immigration laws by Wal-Mart contractors and by Wal-Mart itself.”¹⁸

Despite the apparent brevity and simplicity of the settlement terms, the implications of the settlement on corporate America remain cloudy and worrisome. The diverging quotes of Wal-Mart executives and federal officials cast light on this uncertainty. Does the settlement suggest that ICE will soon expect other companies to implement “Wal-Mart-like” programs to

¹⁴ 8 U.S.C. § 1324a(a)(1) (2000). See Press Release, U.S. Immigration & Customs Enforcement, *supra* note 10.

¹⁵ *Wal-Mart, Government Settle Immigration Investigation; No Criminal Charges Filed Against Company or Its Associates*, HISPANICBUSINESS.COM, Mar. 18, 2005, <http://www.hispanicbusiness.com/news/newsbyid.asp?id=21723>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Greenhouse, *supra* note 13.

demonstrate their compliance with immigration laws and to monitor the actions of its independent contractors? Does the initiation of this action by ICE and the DOJ reflect a new priority to scrutinize the relationships between companies and their independent contractors more carefully? If so, how can companies most effectively respond to the challenges?

The goal of this Article is to address these questions by evaluating the responsibilities of employers engaged in relationships with independent contractors, using the Wal-Mart settlement as a backdrop for the analysis. Section III presents the relevant portions of the Immigration Reform and Control Act of 1986 (IRCA), the statutory standards imposed under the act, and the interpretations of those standards by the courts. Section IV discusses the current state of independent contractor law and specific areas where employers of independent contractors have special responsibilities. Section V attempts to reconcile the Wal-Mart settlement with the underlying immigration law and independent contractor law outlined in sections III and IV. Section VI proffers strategic options that employers can consider for dealing with the demands of independent contractor law and the IRCA. The Article then concludes in section VII with final thoughts on the intersection of independent contractor and immigrant employment laws.

III. IMMIGRATION REFORM AND CONTROL ACT OF 1986

An illegal immigrant is a non-citizen who either enters the United States without a visa or proper documentation, or who remains in a country after his or her visa has expired. Section 1324(a)(1) of the Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful for “a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”^{19,20} Section 1324(a)(4) of the IRCA, which relates to an employer’s use of an independent contractor, reads as follows:

[A] person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after [the date of the enactment of this section], to obtain the labor of an alien . . . in the United States knowing that the alien is an unauthorized alien with respect to performing

¹⁹ 8 U.S.C. § 1324a(a)(1).

²⁰ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended 8 U.S.C. § 1324a(a)–(b), enacting serious substantive and procedural changes in the U.S. immigration laws under IIRIRA § 412. Gabrielle M. Buckley, Immigration and Nationality, http://www.abanet.org/intlaw/divisions/public/immigration_article1.html (last visited Apr. 7, 2006). The number of acceptable documents for I-9 verification have been reduced, employers must have a document verification system, multi-employer associations are subject to new rules, and penalties for violating the immigration labor laws have been increased. *Id.* The 1996 Act also made it a crime for an employer to knowingly hire ten or more people unauthorized to work; to knowingly or with reckless disregard prepare, file or assist another in preparing or filing false documents; and to knowingly and willfully fail to disclose one’s role as a preparer of false documents. 8 U.S.C. § 1324c(e) (2000).

such labor, shall be considered to have hired the alien for employment in the United States²¹

An employer notified of the unauthorized status of an alien employee must immediately terminate the employment relationship.²² However, an employer of unauthorized aliens can assert a good faith defense if the employer believes that it has complied with the statute's employment verification system.²³ Such an employer, if the attempted compliance was in good faith, is relieved of liability.²⁴

The statute's verification system prescribes a three-part test for employers:

- (1) The employer must attest that it verified that the individual is not an unauthorized alien by examining certain documents, included but not limited to a passport or resident alien card;
- (2) The individual must attest to his legality and employment authorization; and
- (3) The employer must retain the verification forms discussed above in 1 and 2.²⁵

An employer who violates any section of the statute is subject to civil fines and criminal penalties. The maximum fine is \$2,000 per unauthorized alien for the first violation, \$5,000 per unauthorized alien for the second violation, and \$10,000 per unauthorized alien for a person or entity previously subject to more than one order under the statute.²⁶

In considering the implications of the IRCA, it is helpful to note the goals of the act as articulated by the courts. These goals include limiting the flow of illegal immigration into the United States, encouraging legal immigration, preserving jobs for authorized workers, and creating criminal liability for employers found violating the IRCA.²⁷ The motivations behind the act flow

²¹ 8 U.S.C. § 1324a(a)(4).

²² *Id.* § 1324a(a)(2) ("It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.").

²³ *Id.* § 1324a(a)(3). The major responsibilities of an employer for determining the employment status of an applicant can be assembled from multiple government sources but must be consistent with the requirements of the United States Citizenship and Immigration Services. *See* U.S. Citizenship & Immigration Servs., Frequently Asked Questions About Employment Eligibility, <http://www.uscis.gov/graphics/howdoi/EEV.htm> (last visited July 28, 2006).

²⁴ 8 U.S.C. § 1324a(a)(3) ("A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.").

²⁵ *Id.* § 1324a(b).

²⁶ *Id.* § 1324a(e).

²⁷ *See* *Steiben v. INS*, 932 F.2d 1225 (8th Cir. 1991); *see also* *Patel v. Quality Inn S.*, 846 F.2d 700, 704-05 (11th Cir. 1988) (stating that an objective of the IRCA is to "discourage illegal immigration"); *see also* *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893

naturally from a general policy of decreasing the incentives of both employers and illegal aliens to act unlawfully.²⁸ Since, as the court argued, the opportunity for employment is the main attraction for illegal immigration, the potential of civil and criminal penalties discourages employers from providing such opportunities and thus decreases the influx of illegal aliens.²⁹

There is a less obvious purpose behind the IRCA, offered by the Ninth Circuit, which provides insight into ICE's settlement with Wal-Mart. In *Collins Food International, Inc. v. INS*,³⁰ the Court cited the legislative history of the IRCA in concluding that the due diligence of an employer in verifying the legality and authenticity of an employee's authorization documents should be evaluated by the "reasonable man" standard.³¹ In other words, employers accepting documents that reasonably appear to be valid and sufficient are not required to further investigate the authenticity of the documents.³²

This standard, which is essentially a restatement of the good faith defense described above under § 1324(a)(3), applies to the Wal-Mart case. If, as it was alleged, ICE had evidence that Wal-Mart had knowingly hired contractors who employed illegal aliens, the good faith defense of attempted compliance with verification procedures was not available to Wal-Mart.³³ Had the independent contractors that were charged criminally in the settlement been able to demonstrate that they reasonably believed that the alien employees were authorized for employment, based on authentication documents, neither the contractors nor Wal-Mart would have been subject to liability under the IRCA.

(1984) (stating that "[a] primary purpose in restricting immigration is to preserve jobs for American workers"); see also *Nat'l Ctr. for Immigrants' Rights v. INS*, 913 F.2d 1350, 1374-375 (9th Cir. 1990) (Trott, J., dissenting) (arguing that the purpose of the IRCA is to "protect U.S. citizens . . . from competition by illegal aliens.").

²⁸ The Eighth Circuit found these motivations in the legislative history of the Immigration Reform and Control Act of 1986: "Employers will be deterred by the penalties in [the act] from hiring unauthorized aliens, and this, in turn, will deter aliens from entering illegally or violating their status in search of employment." *Steiben*, 932 F.2d at 1228.

²⁹ *Id.*; see also H.R. REP. NO. 99-682, pt. 1, at 46 (1986), reprinted in 1986 USCCAN 5649, 5650 ("The [IRCA] establishes penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country.").

³⁰ 948 F.2d 549 (9th Cir. 1991).

³¹ *Id.* at 554.

³² The court found that Collins Foods did not have the kind of positive information that the INS had provided in *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989) and *New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991) to support a finding of constructive knowledge. Neither the failure to verify documentation before offering employment, nor the failure to compare the back of the applicant's Social Security card with the example in the INS manual, justifies such a finding. There is no support in the employer sanctions provisions of IRCA or in their legislative history to charge Collins Foods, on the basis of the facts relied on by the ALJ here, with constructive knowledge of Rodriguez' unauthorized status. *Collins Foods Int'l, Inc.*, 948 F.2d at 555-56.

³³ McCaffrey, *supra* note 13; Nat'l Org. for Women of N.J., 300 Sought at Wal-Mart—Workers Nabbed on Immigration Charges (Oct. 23, 2003), <http://www.nownj.org/njnews/2003/1023%20300%20sought%20at%20Wal-Mart.htm>.

A. *Defining “Knowledge” Under the IRCA*

An essential consideration prior to the imposition of liability under the IRCA is whether the employer had knowledge of the employee’s status as an unauthorized alien. This knowledge can be either actual or constructive.³⁴ Actual knowledge refers to the company’s direct and clear awareness of the employee’s status as an unauthorized alien or awareness of such information as would cause a reasonable person to inquire further as to the applicant’s status.³⁵ In other words, did the company know, or did it have reason to question, whether the applicant was an undocumented worker?

As defined in *Etuk v. Slattery*, constructive knowledge is what a reasonable and prudent employer should know.³⁶ Employers are therefore afforded the protection of reasonably relying on authorization documents and verification forms, absent some indication that would cause a reasonable employer to search further. For example, if a potential employee gives the employer authorization documents that do not appear suspicious or insufficient on their face, the employer is not required to investigate further.³⁷

However, the Ninth Circuit, in *New El Rey Sausage Co. v. INS*, found that an employer could be held liable under a constructive notice standard.³⁸ In this case, the Immigration and Naturalization Service (INS) notified the employer that specific employees of his were unauthorized. Once this notification was given, stated the court, the employer immediately had a duty to either discontinue employment or seek to correct the insufficient authorization documents.³⁹

The constructive knowledge standard has implications for all employers that utilize independent contractors. It indicates that an employer could be held liable for the hiring practices of an independent contractor if it has adequate notice that the contractor is employing illegal aliens.⁴⁰ For example, if a governmental body such as INS or ICE gives the employer notice that one of its independent contractors is employing illegal aliens, the employer would face an affirmative duty to act. It follows, therefore, that the employer could either terminate its relationship with the contractor or require the contractor to immediately end its employment relationship with the illegal aliens. If the employer fails to respond in an adequate manner, it can be inferred from the

³⁴ 8 U.S.C. § 1324a(a)(4) (2000).

³⁵ *Id.* § 1324a(b).

³⁶ *Etuk v. Slattery*, 803 F. Supp. 644, 645 (E.D.N.Y. 1992).

³⁷ *Id.*

³⁸ *New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991).

³⁹ *Id.* (noting that in response to an INS letter insisting that the company provide valid employment authorization, “New El Rey merely asked its employees whether their cards were valid. . . . New El Rey relied on their self-serving statements without requiring anything further from the employees, apparently assuming that the INS must have made a mistake. . . . [M]ere reliance on an assumption that the INS has erred is not sufficient to satisfy section 1324a(a)(2).”).

⁴⁰ 8 U.S.C. § 1324a(a)(4).

above cases that this constructive knowledge would subject the employer to liability for “knowingly hiring” an unauthorized alien under the IRCA.

What would happen if an employer takes affirmative measures to verify the documents of its independent contractor’s workers? In other words, had Wal-Mart asked its independent contractors to provide employee verification forms, would Wal-Mart later be subject to liability should the forms ultimately prove to be inadequate? The case law and language of the IRCA suggest that an employer would be liable in such a situation. Otherwise it is possible, at least in theory, that a company could purposely avoid a practice of verification solely to protect itself from future liability under immigration laws in the event that the independent contractor was ever found guilty under the IRCA.

In the Wal-Mart case, the settlement requires the employer to implement certain procedures to safeguard against a reoccurrence of independent contractors employing illegal aliens.⁴¹ Therefore, if other companies follow suit and adopt similar procedures, it is quite clear that they will implicitly be accepting an affirmative duty to authenticate the legality of an independent contractor’s employees.

Once documents are requested, the employer assumes a reasonable duty to verify the accuracy of the independent contractor’s employment documents. Consequently, a duty arises to respond reasonably to any notice that the employees of such a contractor are unauthorized, regardless of the employer and independent contractor’s initial screening.

Any indication of potential problems, either from the face of the documents or through communications with the INS, will impose a “reasonably prudent employer” duty. A failure to comply with such a duty and the continued employment of unauthorized workers would place the company in violation of the IRCA under the constructive knowledge standard.

Interestingly, Wal-Mart has ceased its practice of contracting out certain labor intensive tasks, including the after-hours cleaning of its stores.⁴² This action, taken to shield the company from liability for illegal actions of independent contractors, makes Wal-Mart wholly liable for its own process of authenticating and verifying the work status of hundreds of additional employees.

B. Individual Liability Under the IRCA

The IRCA imposes liability on a “person or other entity” who knowingly hires unauthorized aliens, and extends its reach to those employers using illegal labor through contract.⁴³ Specifically, the statute has been interpreted to allow the government to hold company executives individually liable for the actions of the corporation.

⁴¹ Press Release, U.S. Immigration & Customs Enforcement, *supra* note 10.

⁴² *Wal-Mart Agrees to Landmark Settlement*, MSNBC.COM, Mar. 18, 2005, www.msnbc.msn.com/id/7230597.

⁴³ 8 U.S.C. § 1324a(a)(4).

In *Steiben v. INS*, the Eighth Circuit held that the “person or other entity” language of the IRCA can impose joint liability on both the corporate employer and its agent.⁴⁴ In *Steiben*, the plaintiff was the chief executive officer and sole proprietor of a Missouri corporation charged by the INS with hiring unauthorized aliens. In rejecting his defense that the statute subjects only the corporation to liability, the court stated that his retention of control over hiring policies was sufficient to satisfy the “knowingly” standard.⁴⁵

Although the corporation, as the employer and principal, is liable under the IRCA, the court noted that the principal’s agent can also be charged where he or she has exercised control over the hiring, firing, and verification of the employees’ authorization. The key issue in the analysis, said the court, is not who the actual employer is but who is in charge of “knowingly hiring” the alien employees. Therefore, an agent of a company will not escape personal liability when hiring unauthorized aliens simply because he is acting on behalf of the company and not in an individual capacity.⁴⁶

Although the structure and policies of large companies such as Wal-Mart are vastly different from those of small corporations like *Steiben*’s, the potential for individual liability for corporate agents remains. The basis for liability in employment decisions does not rest on the individual’s control over every aspect of the corporation’s business, but instead on his or her retention of control over hiring policies. The language of the IRCA makes clear that it is illegal to either knowingly hire unauthorized aliens or knowingly employ unauthorized aliens. While the employer’s exposure to liability is quite clear, the agent’s potential for liability is less certain.

Under this standard, company executives exercising control over hiring may be liable individually should the company hire unauthorized aliens. During the settlement negotiations with Wal-Mart, ICE gave serious consideration to attaching individual liability to specific senior executives as well as individual store managers for their actions in hiring and employing the unauthorized employees.⁴⁷ It was only after a thorough investigation that the United States concluded that federal criminal proceedings involving Wal-Mart’s directors, officers, or employees would not be appropriate.⁴⁸

The fact that the decision did not reflect policy, but rather an individual, situationally-influenced interpretation of the statute, has unsettling implications. Consider the previous example where a company is charged with a failure to act as a reasonably prudent employer due to its voluntary assumption of duties in the verification of an independent contractor’s employees. Further, assume that the contractor is found to be in violation of the IRCA and, as a consequence, the employer is also charged with knowingly

⁴⁴ *Steiben v. INS*, 932 F.2d 1225, 1228 (8th Cir. 1991).

⁴⁵ *Id.* (“Liability turns upon the act of hiring—which may be performed by the employer or an agent of the employer—and not simply upon the fact of being an employer of an unauthorized alien.”).

⁴⁶ *Id.*

⁴⁷ Press Release, U.S. Immigration & Customs Enforcement, *supra* note 10.

⁴⁸ *Id.*

employing unauthorized aliens. In such an example, it is possible that the company manager in charge of hiring the independent contractors or running the internal compliance program would be both criminally and civilly individually liable under the statute.

The important issue to determine is who had control and, by virtue of such control, had constructive knowledge of the illegal hiring and employment. Wal-Mart representatives asserted that the final decision to use independent contractors for store cleaning rested with the store manager and was not corporate policy.⁴⁹ If these statements are correct, and the store manager had either direct or substantial knowledge that the independent contractor was employing unauthorized aliens, the individual store manager could be held personally liable for fines of up to \$2,000 per unauthorized alien.⁵⁰

IV. INDEPENDENT CONTRACTOR LAW

As a general rule, an employer is not liable for the torts or criminal conduct of an independent contractor or the employees of an independent contractor.⁵¹ The rationale behind this rule is that an independent contractor, by definition, does not fall under the control of an employer. While the employer and independent contractor agree on the task to be completed, the independent contractor has control of its own work and the manner in which it performs the work.⁵²

Courts have identified many factors relevant to the issue of control, including direct control over an individual, method of payment, scope of relationship, skill required in carrying out the work, whether or not the person or entity employed is in a distinct occupation, distinct business of the employer, length of the agreement, entity supplying the materials or tools, and substantive belief of the contracting parties.⁵³

It is prudent for managers to consider the potential implications of the Wal-Mart investigation and the subsequent settlement on established independent contractor law. Such a widely-publicized settlement can disturb longstanding beliefs regarding the limited liability that employers have for the acts of independent contractors they hire. Regardless of whether the consequences of the settlement ultimately rest entirely within the IRCA, the possible reshaping of independent contractor law warrants consideration. Two areas relevant to this discussion include where an employer retains control over the independent contractor, discussed in part A of this section, and where an

⁴⁹ Tim O'Brien, *Class Action Against Wal-Mart Picks Up Steam*, N.J.L.J., Apr. 4, 2005, at 4.

⁵⁰ 8 U.S.C. § 1324a(e) (2000).

⁵¹ 41 AM. JUR. 2D *Independent Contractors* § 27 (2005).

⁵² *Id.* Also, to qualify as an employer-employee relationship, the independent contractor cannot be free to do the work in his own manner. RESTATEMENT (SECOND) OF TORTS § 414 (1965).

⁵³ RESTATEMENT (SECOND) OF AGENCY § 220 (1958); RESTATEMENT (SECOND) OF TORTS § 414; *Spain v. Mont. Dep't of Revenue*, 49 P.3d 615 (Mont. 2002).

employer is negligent in hiring a reckless independent contractor, discussed in part B.

A. *Employer's Retention of Control*

The main justification for exempting an employer from liability for the actions of an independent contractor is that the employer is not exercising control over the contractor. Consequently, when the employer retains some degree of control and thus eliminates this rationale, liability may arise. In the event of control by the employer over the independent contractor, the means of production, or the work product, the emergent relationship between the two parties as employer and employee trumps the intended relationship as employer and independent contractor.

One obvious instance in which an employer will remain liable is where it affirmatively controls the independent contractor's work and then fails to exercise reasonable care in supervising or controlling such work.⁵⁴ Such retention of control justifies treating the employment situation as an employer-employee relationship, thus subjecting the employer to liability for failure to exercise reasonable care.

Another instance in which an employer remains liable occurs when an employer and independent contractor expressly contract to jointly supervise some aspect of the production.⁵⁵ When this area of joint control is the locus of the harm in the cause of action, the employer is liable.

When the employer's retention of control is limited to a general power of supervision over an independent contractor, the employer does not forfeit the protection of the independent relationship. In *Shaffer v. Acme Limestone Co.*, a motorist's estate brought a wrongful death action against the employer, a stone quarry, and the independent contractor, a trucking firm carrying the stone, after the motorist was killed in an accident involving the truck.⁵⁶ In finding that the trucking firm was an independent contractor and not an employee of the stone quarry, the court stated:

[A]n owner who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract—including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work—without changing the relationship from that of owner and independent contractor, or [changing] the duties arising from that relationship.⁵⁷

An analysis of a working relationship and the subsequent classification of the legal status of the parties are usually highly fact-intensive and depend on the unique circumstances surrounding the relationship. In *Weary v. Cochran*,

⁵⁴ 41 AM.JUR.2D *Independent Contractors* § 33 (2005).

⁵⁵ 41 AM.JUR.2D *Independent Contractors* § 35 (2005).

⁵⁶ *Shaffer v. Acme Limestone Co.*, 524 S.E.2d 688 (W. Va. 1999).

⁵⁷ *Id.* at 696 (citing *City of Miami v. Perez*, 509 So. 2d 343 (Fla. Dist. Ct. App. 1987)).

the Sixth Circuit Court of Appeals stated that the two most important factors in determining the status of the relationship are the “employer’s ability to control job performance and the employer’s ability to control employment opportunities.”⁵⁸

The court in *Weary* recognizes that most courts scrutinize the free will and discretion of the independent contractor to carry out the employment tasks as the starting point in defining the relationship between the company and the contractor. Where this free will is not present, it is most likely that a court will find that an employer-employee status more accurately classifies the relationship.⁵⁹

Weary’s relevance and importance increase if the DOJ and ICE decide to take a more active role in pursuing employers under a vicarious liability cause of action due to the activities of its independent contractors. It is plausible, for example, that a court could consider the vast difference in bargaining power between a large corporation and an independent contractor as a factor. This may imply a source of control, even though actual control is difficult to locate.

Finally, an employer may expose itself to limited liability under the narrower “retained control doctrine.”⁶⁰ This doctrine exists where an employer retains control over a specific portion of the independent contractor’s work, but not to the degree that the two parties should be treated as employer and employee. Therefore, the employer will only be liable for the specific portion of the work that it controlled, and will consequently only owe a duty of reasonable care with respect to that specific portion. In essence, the retained control doctrine extends an employer-employee status to only that fraction of the relationship where the independent contractor truly remains under the control of the employer.

⁵⁸ *Weary v. Cochran*, 377 F.3d 522, 525 (6th Cir. 2004). Other important considerations, known as the *Darden* factors, include (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party’s discretion over when and how long to work; (7) the method of payment; (8) the hired party’s role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party. *Weary*, 377 F.3d at 525 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992)). It is noteworthy that the *Weary* court stressed that the initial factors of control over the job performance and employment opportunities outweigh the other twelve *Darden* factors. *Id.*

⁵⁹ RESTATEMENT (SECOND) OF TORTS § 414 (1965). However, as the comprehensive nature of the *Darden* factors suggests, the actual classification of the legal status of the parties remains highly fact-intensive and all specific characteristics of the relationship should be considered. *Weary*, 377 F.3d at 525.

⁶⁰ 41 AM. JUR. 2D *Independent Contractors* § 33 (2005).

B. Negligent Hiring of Independent Contractor

An employer can be held liable for the actions of an independent contractor if the employer was negligent in hiring or retaining the contractor.⁶¹ Stated another way, the employer will be liable for the acts of a contractor where the employer knew, or should have known with reasonable care, that the contractor was reckless or incompetent.

The employer has a different standard of care under this negligence theory than under the “constructive knowledge” standard. Whereas the IRCA requires an employer to have knowledge of the employment of unauthorized aliens, an employer will be liable under a negligent hiring theory if it failed to exercise reasonable care in selecting or retaining the independent contractor that was found to have violated laws on alien employment.⁶²

In 2001, a North Carolina appellate court set out a four-part test for determining when an employer is subject to a claim of negligent hiring.⁶³ The plaintiff must “prove four elements: (1) the independent contractor acted negligently; (2) he was incompetent at the time of hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff’s injury was the proximate result of this incompetence.”⁶⁴ In *Kinsey v. Spann*, the court applied the test to find that a landowner was not liable for death of her neighbor where the neighbor’s death was caused by a non-professional tree cutter employed by the landowner. Although the tree-cutter himself was found liable for the neighbor’s death, the court ruled that the mere fact that the tree-cutter was not professionally licensed did not constitute constructive knowledge of incompetence.⁶⁵

A plaintiff’s difficulty in succeeding under this cause of action often rests with the third element in the four-part test—that the plaintiff’s injury was the proximate result of the independent contractor’s incompetence. A California court, in *Risley v. Lenwell*, held that actual or constructive notice, or knowledge, can be inferred from the facts of the case.⁶⁶ In *Risley*, the court upheld a finding of negligent hiring where the employer, a lumber company, knew that the independent contractor, a truck driver, did not have proper equipment to transport the lumber.⁶⁷ Here, the employer inspected the

⁶¹ 41 AM. JUR. 2D *Independent Contractors* § 32 (2005) (stating that an employer may be liable for the actions of an independent contractor if the employer is aware of any unlawful actions of an independent contractor and fails to take corrective measures or to cancel the contract); 41 AM. JUR. 2D *Independent Contractors* § 36 (2005) (stating that employer may be liable for the negligence of an independent contractor if the employer is negligent in selecting the independent contractor).

⁶² 41 AM. JUR. 2D *Independent Contractors* § 32 (2005); 41 AM. JUR. 2D *Independent Contractors* § 36 (2005).

⁶³ *Kinsey v. Spann*, 533 S.E.2d 487 (N.C. Ct. App. 2000).

⁶⁴ *Id.* (citing *Medlin v. Bass*, 398 S.E.2d 460, 462 (N.C. 1990)).

⁶⁵ *Id.*

⁶⁶ *Risley v. Lenwell*, 277 P.2d 897 (Cal. Dist. Ct. App. 1954).

⁶⁷ *Id.*

independent contractor's truck and aided in loading the lumber. Consequently, the court found that a reasonable jury could infer from such facts that the employer had constructive notice or knowledge of the contractor's incompetence and therefore was negligent in its hiring.⁶⁸

However, an employer will not be found to have constructive knowledge where a reasonable inspection would not have alerted the employer to the employee's incompetence. In *Duncan v. United States*, a federal district court in Louisiana ruled that the plaintiff did not meet its burden in a negligent hiring case against the government resulting from an accident involving a mail truck.⁶⁹ Prior to his hiring, the driver had furnished a form to the government admitting solely to a prior conviction for a speeding ticket when he had in fact recently been convicted on a gun possession charge and had two auto accidents. Although an updated form, which listed the three additional events, was submitted two weeks before the accident at issue in the case, the court ruled that the government did not have actual or constructive knowledge of the incompetence of the driver.⁷⁰

The *Duncan* holding is relevant to an understanding of an employer's duty to verify the authentication documents of aliens. The IRCA imposes a statutory duty on an employer to act with reasonable prudence in verifying the authenticity of alien employees. However, as the holding in *Duncan* points out, constructive knowledge will not be imputed to a person or entity simply because a hired party proves to be reckless. In other words, reasonable prudence should be measured at the time of hiring, and not with the added benefit of hindsight. It follows, therefore, that an employer seeking to meet its reasonable prudence burden under the IRCA will only be judged on the basis of the facts and circumstances available at the time of the verification, and need not undertake responsibilities exceeding the boundaries of reasonability to satisfy its burden.

To avoid potential liability under a negligent hiring charge, an employer should act affirmatively to make a reasonable determination about the general competency of the independent contractor. In *Suarez v. Gonzalez*, a Florida district court held that where the underlying work is neither inherently dangerous nor specialized, an employer need only make a "minimal inquiry" into the competency of an independent contractor.⁷¹ For example, the court noted that a company hiring someone such as a plumber or carpenter is entitled to a belief that the plumber or contractor is competent.⁷² No further investigation is needed as the mere fact that the contractor holds himself out as such is sufficient, assuming there are no clear indications to suggest otherwise.⁷³

⁶⁸ *Id.*

⁶⁹ *Duncan v. United States*, 562 F. Supp. 96 (E.D. La. 1983).

⁷⁰ *Id.* at 100.

⁷¹ *Suarez v. Gonzalez*, 820 So. 2d 342, 346 (Fla. Dist. Ct. App. 2002).

⁷² *Id.*

⁷³ In *Suarez v. Gonzalez*, the court found a landlord liable for negligent hiring where the landowner hired an individual walking on the street to construct a garage cabinet and the

If an employer has previously used a contractor without incident, this fact also operates as evidence of an employer's lack of negligence in hiring.⁷⁴ In *Jones v. Beker*, an Illinois appellate court refused to extend liability to an auto sales shop where a repossession company, hired at the direction of the defendants, struck and injured a pedestrian.⁷⁵ Although the reposessor was not licensed, the court noted that the defendant auto sellers had used the specific reposessor in the past and had been satisfied with its services.⁷⁶

Although some situations require only minimal inquiry, such inquiry must still meet the standard of reasonable care under the circumstances.⁷⁷ To determine what constitutes reasonableness under the circumstances, the *Restatement (Second) of Torts* weighs two major factors: the degree of specialization of the work and the sophistication of the employer.⁷⁸ Consequently, the standard of "reasonableness" will be higher for a sophisticated or large employer that hires an independent contractor to engage in inherently dangerous or specialized work than for a solo practitioner that enters into a contract relationship for an ordinary activity.

Although the Wal-Mart case involves cleaning services, which would likely be classified as an unspecialized activity, it can be argued that Wal-Mart's sheer size and sophistication result in a heightened expectation of due diligence to avoid a negligent hiring claim. In the future, if companies are to face increased liability due to potential negligent hiring claims, large companies must anticipate that their standard of reasonable care will be greater than that of a small, less sophisticated solo practitioner. Consequently, companies should be advised that the standard of reasonable care in this area is relative and, as a consequence, it can be inferred that stricter policies will be required of them to satisfy their burden.

Table 1 summarizes the key findings of case law that pertain to employer liability resulting from immigrant hiring and independent contractor activities undertaken on behalf of the employer. The table can serve as a reference guide

cabinet later collapsed and injured a tenant. *Id.* at 343–44. No certification of the independent contractor was ever requested nor was a permit secured. *Id.* The court concluded, in part: "Here, because Suarez negligently hired the 'phantom' contractor, she is liable for his negligence to the same extent as if she had done the work herself. This is similar to situations of vicarious liability, such as master and servant, or the breach of a nondelegable duty, where there are no logical bases for apportioning liability into percentages of fault. Liability for damages may not be apportioned to a nonparty defendant where that liability is vicarious in nature." *Id.* at 347.

⁷⁴ *Jones v. Beker*, 632 N.E.2d 273 (Ill. App. Ct. 1994).

⁷⁵ *Id.*

⁷⁶ The court in *Jones* stated: "In addition, there is no other evidence in the record indicating that Condor Recovery was unfit for the job so as to create a danger of harm to plaintiff. Even though Condor Recovery was not licensed as a reposessor, it had been recommended by other car dealers and neighbors. Moreover, defendants had previously used Condor Recovery to repossess vehicles and were satisfied with its services. Therefore, we conclude that defendants are not liable under the theory of negligent hiring." *Id.* at 278 (citation omitted).

⁷⁷ *Id.* at 277.

⁷⁸ RESTATEMENT (SECOND) OF TORTS § 411 cmt. c (1965).

in understanding an employer's responsibilities as determined by the most recognized cases on immigration and independent contractor law.

Table 1: Case Law on Immigrant Hiring and Independent Contractor Liability		
CASE	AREA OF LAW	CONSEQUENCE FOR EMPLOYER
<i>Collins Foods Int'l, Inc. v. INS</i> , 948 F.2d 549 (9th Cir. 1991).	Immigration law: 8 U.S.C. § 1324	Compliance with the statute must be judged by the "reasonable man" standard; employers are not strictly liable for verifying authenticity of workers.
<i>Etuk v. Slattery</i> , 803 F. Supp. 644 (E.D.N.Y. 1992).		"Constructive knowledge" under the statute entails what a reasonable and prudent employer would know; employer therefore has a duty to investigate further where documents appear suspicious on their face.
<i>New El Rey Sausage Co. v. INS</i> , 925 F.2d 1153 (9th Cir. 1991).		Once notice is given to employer regarding unauthorized workers, employer must either terminate employment relationship or get authorized documents.
<i>Steiben v. INS</i> , 932 F.2d 1225 (8th Cir. 1991).		The purpose of § 1324 is to decrease incentives for illegal aliens and employers; civil and criminal penalties in statute serve as a deterrence; liability extends to individuals under § 1324.
<i>Duncan v. United States</i> , 562 F. Supp. 96 (E.D. La. 1983).	Independent Contractor Law: Negligent Hiring	Employer will not have constructive knowledge or notice of incompetence where a reasonable inspection would not have uncovered such incompetence.
<i>Jones v. Beker</i> , 632 N.E.2d 273 (Ill. App. Ct. 1994).		Past usage of a contractor without incident is evidence of a lack of negligence in hiring.

Table 1 (continued)		
CASE	AREA OF LAW	CONSEQUENCE FOR EMPLOYER
<i>Kinsey v. Spann</i> , 533 S.E.2d 487 (N.C. Ct. App. 2000).	Independent Contractor Law: Negligent Hiring (continued)	Four-part test for negligent hiring: (1) the independent contractor acted negligently; (2) the contractor was incompetent at the time of hiring; (3) employer had notice of the incompetence; and (4) plaintiff's injury was result of this incompetence.
<i>Risley v. Lenwell</i> , 277 P.2d 897 (Cal. Dist. Ct. App. 1954).		Actual or constructive knowledge or notice of incompetence of independent contractor can be inferred.
<i>Shaffer v. Acme Limestone Co.</i> , 524 S.E.2d 688 (W. Va. 1999).		An employer can retain a broad general control (i.e. right to inspect, to make suggestions, to stop work) over an independent contractor without triggering an employer-employee legal status.
<i>Suarez v. Gonzalez</i> , 820 So. 2d 342 (Fla. Dist. Ct. App. 2002).	Independent Contractor Law: Retention of Control	Where underlying work is neither specialized nor dangerous, employer's inquiry into independent contractor's competence need be only minimal.
<i>Weary v. Cochran</i> , 377 F.3d 522 (6th Cir. 2004).		The two most important factors in determining the legal status of the contractual relationship are the employer's ability to control job performance and the employer's ability to control employment opportunities.

V. CONSEQUENCES OF THE SETTLEMENT FOR WAL-MART

Although Wal-Mart agreed to pay \$11 million to settle federal allegations, the settlement language expressly states that Wal-Mart did not have direct knowledge of the independent contractors' employment of illegal aliens.⁷⁹ As Wal-Mart spokeswoman Mona Williams said: "Despite a long, thorough and high-profile investigation, the government has not charged anyone at Wal-Mart with wrongdoing."⁸⁰ According to federal investigators, charges were settled because Wal-Mart "had pledged strong action to prevent future employment of illegal immigrants" at its U.S. stores.⁸¹

How can this apparent contradiction be reconciled? Since the charges were dropped as a result of the settlement, most of the evidence that ICE has supporting allegations of conscious wrongdoing on the part of Wal-Mart will remain undisclosed, assuming that such evidence exists. Wal-Mart implies that damaging evidence does not exist and insists that the \$11 million payment was "voluntary" and intended to "ensure compliance with immigration laws."⁸² However, why would Wal-Mart pay \$11 million voluntarily?

Lilia Garcia, the executive director of the Maintenance Cooperation Trust Fund, an organization advocating the interests of janitors, does not understand either. Garcia claims that Wal-Mart's use of independent contractors was "a real pattern and practice" and that the monetary penalty "would hardly" serve as a deterrent for a company of Wal-Mart's size.⁸³ If Garcia is correct, why would ICE accept this settlement? Further, if ICE truly had evidence that Wal-Mart knew of the unauthorized workers, was it not duty bound to proceed with an enforcement proceeding?

While the complete facts may never emerge, some of the benefits to each party under the settlement are clear. According to Thomas Marino, U.S. Attorney for the Middle District of Pennsylvania, the civil settlement constitutes the most significant enforcement action taken by the United States in the field of immigration employment sanctions since the laws prohibiting employment of illegal aliens were first enacted in 1986.⁸⁴ The \$11 million civil settlement was approximately four times larger than any other single payment

⁷⁹ *Wal-Mart Settles Illegal Immigrant Janitors Case for \$11 Million*, BOSTON.COM, Mar. 18, 2005, http://boston.com/business/articles/2005/03/18/wal_mart_settles_illegal_immigrant_janitors_case_for_11_million/; Press Release, U.S. Immigration & Customs Enforcement, *supra* note 10

⁸⁰ Chuck Bartels, *Fine Costs Wal-Mart a Record \$11 Million*, VENTURA COUNTY STAR, Mar. 19, 2005, at Bus. & Stocks 1.

⁸¹ Greenhouse, *supra* note 13.

⁸² *Id.*; *Undocumented Immigrants Close to 11 million*, MSNBC.COM, Mar. 21, 2005, <http://www.msnbc.msn.com/id/7255409/>; *No Charges Against Wal-Mart; Company Fined in Immigrant Probe*, MACOMB DAILY, Mar. 19, 2005.

⁸³ Greenhouse, *supra* note 13.

⁸⁴ Press Release, U.S. Immigration & Customs Enforcement, *supra* note 10.

received by the government in an illegal alien employment case.⁸⁵ Thus, ICE was able to secure positive publicity for a successful investigation, raise awareness about the problems associated with illegal labor, and perhaps intimidate other companies into more thorough compliance with immigration laws. While these benefits were suboptimal, in the alternative, there was the possibility that a trial would be lost. By settling, Wal-Mart was able to quell a public relations problem and avoid criminal indictments. The \$11 million fine represented only about one-tenth of one percent of the company's \$10.3 billion in net income in its 2004 fiscal year.⁸⁶ This amount is about equal to a \$53.50 fine for someone making \$50,000 a year.⁸⁷

However, the really serious impositions on Wal-Mart involved much greater resource commitments than the single, lump-sum payment. By agreeing to "establish a means to verify that independent contractors are also taking reasonable steps to comply with immigration laws,"⁸⁸ the company will incur the financial cost of hiring independent contractors known to employ authorized workers or to take full control of operations that it preferred to outsource, and it will face increased liability under the constructive or actual notice standards because of an increased degree of control.

By agreeing to provide "all of its store managers and future store managers with training regarding immigration employment laws while complying with pertinent anti-discrimination laws,"⁸⁹ the company will incur direct financial cost of the training program, additional screening costs to verify the suitability of independent contractors, and increased liability because added knowledge will require a higher standard of performance for a "reasonable and prudent" employer.

Finally, by agreeing to "continue cooperation in the investigation of the alleged illegal employment,"⁹⁰ the company will incur direct financial cost of maintaining the oversight program, and face increased liability exposure because the program will raise the company's "reasonable and prudent" standard, with the likely result that any violations under the IRCA could be categorized as serious and direct.

Wal-Mart's willingness to settle may be further explained by a class-action lawsuit against the company that grabbed media attention. The case was filed by a group of Mexican night janitors against Wal-Mart in November, 2003. The accusations included labor and tax violations, civil racketeering, civil rights violations, and a false imprisonment allegation resulting from claims that store

⁸⁵ *Wal-Mart Pays \$11M Over Illegal Labor*, Mar. 18, 2005, CNN.COM, http://money.cnn.com/2005/03/18/news/fortune500/wal_mart_settlement/index.htm.

⁸⁶ WAL-MART, 2005 ANNUAL REPORT 33 (2005), available at <http://www.walmartstores.com/Files/2005AnnualReport.pdf>.

⁸⁷ Bartels, *supra* note 80.

⁸⁸ *ICE, Wal-Mart Reach \$11 Million Settlement*, INSIDE ICE (U.S. Immigration & Customs Enforcement), Mar. 28, 2005, at 3, available at <http://www.ice.gov/doclib/pi/news/insideice/articles/InsideICE032805.pdf> (last visited Apr. 11, 2006).

⁸⁹ *Id.*

⁹⁰ *Id.*

managers locked the janitors in the building at night. However, the central claim in the case, filed on behalf of the undocumented contract workers, is that they were underpaid while working for the chain.⁹¹

Attorneys for both the Mexican janitors and for Wal-Mart, respectively, cite the 2005 settlement as proof that the company either should be or should not be liable. The plaintiffs cite the monetary penalty and corresponding language from the earlier agreement “permanently enjoining” Wal-Mart from “knowingly hiring, recruiting and continuing” as evidence of an ongoing pattern of guilt on Wal-Mart’s part.⁹² In essence, the plaintiff’s attorney asks: Why did Wal-Mart settle with the government and pay an \$11 million penalty if the company was not at least partially at fault for a pattern of violations?

Wal-Mart’s attorneys, on the other hand, point to the settlement and specific language of the earlier agreement to bolster their argument that there has been no wrongdoing on the part of the company. According to lead defense attorney David Murray, “The government found no basis to proceed with its criminal investigation against Wal-Mart, and found that none of the workers were Wal-Mart employees.”⁹³

A settlement, by definition, represents a compromise. Therefore, regardless of the underlying substance of the matter, diverging viewpoints often emerge on the meaning and significance of the compromise. Essentially, a main purpose of settlements is to avoid the costs associated with litigation while still securing a moderate victory. It is common for a defending party to accept a penalty in exchange for the other party’s agreement to drop all charges. This seems to be an apt description in the Wal-Mart agreement, especially considering that the settlement was worded precisely to absolve Wal-Mart from liability in a case with many parallels to the one that was filed by the undocumented Mexican janitors.

VI. AN EMPLOYER’S STRATEGIC OPTIONS FOR DEALING WITH INDEPENDENT CONTRACTOR LAW AND THE IRCA

The released terms of the Wal-Mart settlement do not suggest imminent changes in existing independent contractor law. First, the charges arose directly under the IRCA and therefore involved the imposition of a statutory standard. Second, DOJ and ICE initially alleged that Wal-Mart had direct knowledge of the illegal actions of the independent contractors, thus directly meeting the language of the IRCA, a position from which they later retreated.⁹⁴ However, to ignore the possibility that the Wal-Mart agreement could have an effect outside of immigration law is short-sighted and ignores ongoing changes in the interpretation and enforcement of independent contractor law and its interaction with the IRCA.

⁹¹ Michael Barbaro, *Wal-Mart to Pay \$11 Million; Chain Settles Illegal-Worker Investigation*, WASH. POST, Mar. 19, 2005, at E1.

⁹² *Id.*

⁹³ O’Brien, *supra* note 49.

⁹⁴ 8 U.S.C. § 1324a(a)(4) (2000).

While the general rule governing the relationship between employers and independent contractors remains unchanged—an employer is generally not liable for the actions of an independent contractor—there are the two important exceptions discussed earlier in sections IV.A and IV.B: (1) when an employer retains control over the independent contractor, and (2) when an employer can be liable for negligently hiring or retaining an incompetent contractor.

These two exceptions are of increasing importance as companies respond in the wake of the Wal-Mart settlement. Therefore, it is necessary to consider whether companies should change their company policies on independent contractor relationships. Should they be more diligent and attentive, risking the possibility of “retaining control” over the work product? Or, alternatively, should companies adopt an approach of “non-interventionism,” opting to refrain from exercising any control over independent contractors?

A. Strategic Option A: Increase Oversight of Independent Contractors

Wal-Mart essentially agreed to a policy of increased oversight in its settlement with DOJ and ICE. This may at first appear to be a safe and reasonable response. Many companies will look to the charges filed against Wal-Mart and the resulting negative publicity and determine that they do not want to face a similar problem. These firms may choose to reclaim control of elements of their employer-independent contractor relationships in an effort to eliminate the possibility of hiring illegal immigrants.

Generally, a company need not verify the legality of an independent contractor’s employees. A company could verify an independent contractor’s employees, however, if it chose to do so. For example, the employer can assume a role in reviewing and approving the employment documents of the contractor’s employees by demanding a copy of the I-9 employment verification forms.

Unfortunately, there can be negative repercussions of such a proactive strategy. Although the law is not fully developed in this area, it is entirely feasible that the information gained and the control reassumed by this strategy could result in “constructive knowledge” under the IRCA.⁹⁵ Thus, a reasonable and prudent employer should be confident that its independent contractors are using legal labor if the employer has a program in place to verify the authenticity of the contractors’ employees.

The degree of reasonability would increase if the company’s managers underwent immigration law training. Because executives and store managers would have a greater depth of understanding and knowledge on the topic after such education, their ability to monitor and respond effectively to red flags on the employment forms would be enhanced. Consequently, their response would be measured by a higher standard than managers who had not undergone such training.

A reasonable and prudent response under these circumstances, in addition to simply notifying the contractor of a potential problem with an applicant’s

⁹⁵ Etuk v. Slattery, 803 F.Supp. 644, 645 (E.D.N.Y. 1992).

responses on the form, may include a duty to immediately obtain necessary completions or corrections to questions on the form. If the responses cannot be corrected by the applicant, it may be reasonable and prudent for the company to insist that the undocumented worker not be hired or be terminated immediately.

In predicting future developments in this area, it is relatively clear that an employer's review and verification of an independent contractor's employment forms would increase that employer's "knowledge" under the IRCA. It is plausible, therefore, should the workers later be determined to be unauthorized, that an executive or store manager who exerts control on the hiring or verification process could be individually liable should an independent contractor be found guilty of employing illegal aliens. For companies seeking to increase control over independent contractors, such a conclusion should be disconcerting.

B. Strategic Option B: Exercise Minimal Control Over Independent Contractors

A proactive strategy of imposing control over the actions of an independent contractor creates both measurable and indefinite costs on the monitoring employer. For example, the employer would incur the additional costs of instituting a compliance program and adding additional employees to administer such a program. Perhaps more importantly, the employer may subject itself to increased liability under either a retention of control theory or directly under the statutory "knowledge" standard of the IRCA.

The charges against Wal-Mart arose due to an allegation of "knowing employment" of illegal aliens in violation of the IRCA.⁹⁶ Would it be a sound strategy, therefore, for an employer to intentionally disregard the actions of its independent contractors? Would such "non-intervention" erase the potential for liability if the independent contractor violates a statute? The short answer is "no."

The long answer is that concerned employers should focus on the statutory standards under which the allegations arose, e.g., DOJ and ICE never stated or implied that Wal-Mart was investigated for negligence in supervision of its independent contractors. Instead, the charges and settlement announced by ICE were attributed to a violation of immigration law. The initial arrests of the independent contractors and the subsequent allegations against Wal-Mart were couched in the language of the IRCA. Consequently, it is important for other companies to realize that Wal-Mart was pursued because of a perceived violation of a specific statutory standard. However, even if this interpretation is accurate, immigration law clearly overlaps with independent contractor law under the IRCA. Thus, precedent under immigration law is relevant to U.S. companies using contract labor.

It is possible, at least theoretically, that a company could minimize potential liability under the IRCA by exercising zero control over the acts of its independent contractors. However, there are two problems with such an approach. First, ignoring the hiring policies of an independent contractor could

⁹⁶ McCaffrey, *supra* note 13.

constitute “constructive knowledge” if the employer was reckless in its disregard of the contractor’s employment of unauthorized aliens. Under *Etuk*’s “reasonably prudent employer” standard, it is also very possible that an employer that consciously disregards a likelihood of illegal labor could be found in violation of the statute, since a reasonable and prudent employer would investigate the situation where such likelihood exists.⁹⁷

Consider, for example, a situation where an employer receives a bid from a small independent contractor that the employer has reason to believe is only attainable if below-market labor wages are paid by the independent contractor. Would a reasonable and prudent employer accept such a bid? A statutory argument exists that an employer’s turning of a blind eye to the high probability of the use of illegal alien labor in this situation is sufficient to constitute constructive knowledge.

Purposely ignoring the hiring practices of independent contractors can also have the unintended effect of increasing liability under other causes of action. Such a hands-off approach would make an employer more susceptible to a negligent hiring claim. For example, consider the situation depicted above where the employer accepts the bid of a small independent contractor. Assume further that the employer neglects to do a background check on the independent contractor that would have shown that the independent contractor was not licensed to do the specific work. Where a reasonable inspection would have yielded such information, and the employer does not make the inspection, it is liable under a negligent hiring cause of action.

A strategy of minimum oversight may be more advantageous than one of zero oversight. For example, an employer could simply do enough monitoring and initial screening to satisfy the low burdens of “minimal inquiry” (*Suarez*) and “reasonably prudent employer” (*Etuk*).⁹⁸ Further, specific clauses could be placed in the original contract explicitly requiring that the independent contractor hire and retain only authorized workers, as a means of indemnifying the employer should any charges be filed. Another possibility is for the company to insist that the contractor enroll in the Department of Homeland Security’s Systematic Alien Verification for Entitlements (SAVE) program.⁹⁹ SAVE gives software to employers to allow them to access federal databases that will verify the authenticity of any and all employees. Taking small steps such as these, which avoid the dangers of retaining too much control over the independent contractor, may be the safest way for an employer to simultaneously avoid violating the statutory standard.

VII. CONCLUSION

What are the implications of the Wal-Mart settlement for managers who engage independent contractors for human services? This question can be

⁹⁷ *Etuk*, 803 F. Supp. at 644.

⁹⁸ *Id.*; *Suarez v. Gonzalez*, 820 So. 2d 342 (Fla. Dist. Ct. App. 2002).

⁹⁹ U.S. Citizenship & Immigration Servs., Services and Benefits, SAVE Program, <http://www.uscis.gov/graphics/services/SAVE.htm> (last visited Apr. 7, 2006).

answered in two ways. The first answer, from the perspective of legal precedent, is that the statutory law has not been changed. The conditions for the use of labor through contract remain unchanged, in that an employer is generally not liable for the actions of an independent contractor.¹⁰⁰ Therefore, companies that were in compliance with the law before the Wal-Mart settlement technically still are.

The second answer to the question of the implications of the Wal-Mart settlement for employers is that regulatory agencies appear to be undergoing a philosophical shift in their approach to enforcing the laws on immigration. They seem to be demanding that employers become more actively involved in making sure that their independent contractors do not hire illegal immigrants. The office of Immigration and Customs Enforcement has, in fact, announced plans to use the Wal-Mart settlement as a model for future immigration enforcement actions at worksites.¹⁰¹

Wal-Mart agreed to three extraordinary conditions not traditionally required under the laws governing employer-contractor responsibilities, namely, to establish a means to verify that independent contractors are also taking reasonable steps to comply with immigration laws, to provide all of its store managers and future store managers with training regarding immigration employment laws while complying with pertinent anti-discrimination laws, and to continue cooperation in the investigation of the alleged illegal employment. The significance of these three requirements increases dramatically if they are becoming the ICE's *de facto* expectations for all employers.

In fact, there is already evidence that that these requirements will be expected of other companies. Assistant Secretary for the ICE Michael Garcia, when reporting on the significance of the Wal-Mart/DOJ agreement, referred to its groundbreaking quality. Garcia expressed the expectation of a long term impact as follows: "This case breaks new ground not only because this is a record dollar amount for a civil immigration settlement but because this settlement requires Wal-Mart to create an internal program to ensure future compliance with immigration laws by Wal-Mart contractors and by Wal-Mart itself."¹⁰²

Since it is rare for a company to accept liability for the actions of independent contractors, Wal-Mart's agreement to pay \$11 million is a significant and unsettling development. However, while anxious executives may be tempted to implement stricter compliance programs and to adopt preventative measures similar to those agreed to by Wal-Mart under the terms of the settlement, it must be understood that additional responsibilities and increased liability accompany such affirmative measures. Each proactive step taken to authenticate the work status of contract labor has the effect of increasing company oversight costs, and the perverse effect of increasing employer liability, since it increases the employer's control over the

¹⁰⁰ 8 U.S.C. § 1324a(a)(4) (2000).

¹⁰¹ Rupal Parekh, *Wal-Mart Fine Spurs Compliance Scrutiny; Contractors' Hiring Practices Eyed*, BUS. INS., Mar. 28, 2005.

¹⁰² *Id.*

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independent contractor. Proactive policies to limit liability often have the unintended consequence of increasing the company's legal exposure.

The Wal-Mart experience suggests that ICE and DOJ will continue to increase their presence and to demand greater vigilance by employers and their independent contractors, especially in the area of immigrant worker authorization and documentation. While the enforcement of the law in this area is in flux, as it may always be, the best practice for a company engaged with an independent contractor is to be precautionous without exerting unwarranted control over the contractor. It is essential to the proper balance of liability, however, that employers maintain the professional separation that is characteristic of an employer-independent contractor relationship.