

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 2022A00022
	)	
	)	
KLJ LEASING, LLC,	)	
Respondent.	)	
	)	

Appearances: Faten Barakat-Nice, Esq., and James Harmony, Esq., for Complainant
Julie Pace, Esq. and Heidi Nunn-Gilman, Esq., for Respondent

ORDER ON LIABILITY FOR COUNTS VII THROUGH XII

I. INTRODUCTION

This matter stems from Complainant DHS's investigation into whether Respondent was hiring persons who are not authorized to work in the United States. The Department's initial investigation, which occurred in 2013-2015, resolved through a settlement agreement and some changes to Respondent's hiring policies. Complainant conducted a second investigation in 2017. It determined that Respondent continued to hire undocumented persons and that its practices to identify applicants with suspect identification documents was lacking. After a lengthy second investigation, it filed suit for violations of 8 U.S.C. § 1324a. Respondent denies these allegations.

Presently before the Court are the parties' cross-motions for summary decision. To facilitate the adjudication of this case, the Court will address Counts VII through XII of the Amended Complaint in this order. These charges relate to Respondent allegedly:

- Hiring 424 workers knowing that they were aliens who were not authorized to work in the United States because Respondent did not fill out Part 2 of their Forms I-9 where Respondent attests to their ability to lawfully work and provide documents to prove their identity (Count VII);
- Continuing to employ seven workers knowing that they were not authorized to work because their work authorization documents had expired (Count VIII);

- Rehiring 11 employees when Respondent previously received notice from DHS that they were ineligible to work (Count IX);
- Continuing to employ four persons after receiving a Notice of Suspect Documents from DHS advising Respondent that those persons' identities did not match the documents they submitted (Count X); and
- Failing to retain and promptly present to the government electronic records (or metadata) showing how the Forms I-9 were created for 60 people and 89 people, respectively (Counts XI and XII).

The Court will issue a subsequent order addressing summary decision as to Counts I through VI.

II. FINDING OF FACT¹

In keeping with OCAHO precedent, Federal Rule of Civil Procedure 56, Celotex v. Catrett, 477 U.S. 317 (1986), and its progeny, the Court construes the facts in the light most favorable to the non-moving party. On the counts for which there are cross-motions for summary decision, the court must "evaluate each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." ACLU v. City of Las Vegas, 333 F.3d 1092, 1097 (2003); Fed. R. Civ. P. 56.

Respondent is an agricultural company incorporated in Arizona. Resp't's Mot. Part. Summ. Dec., Ex. 1 at 1, Complainant's Mot. Summ. Dec., Ex. G-3 at 3. It employs between 150 and 700 people, with the number fluctuating on a seasonal basis. Resp't's Resp. Mot. Summ. Dec., Ex. A at 2.

First Inspection

DHS previously audited Respondent; the audit lasted between August 20, 2013 and December 12, 2015. *See* Complainant's Mot. Summ. Dec. at 10050, Ex. G-77, *id.* at 110, Ex. G-4, Resp't's Resp. Mot. Summ. Dec., Ex. M at 3.

On July 22, 2014, Complainant served Respondent with a Notice of Technical or Procedural Failures (NTPF or Notice of I-9 Failures). Complainant's Mot. Summ. Dec., Ex. G-67; *see also* Resp't's Mot. Part. Summ. Dec. at 12.

Complainant informed Respondent that its employees must make the corrections to Section 1 of the Forms I-9 (the employee attestation section), rather than Respondent's management making the changes. Complainant's Mot. Summ. Dec. at 9530, Ex. G-67.

¹ The undisputed facts are drawn from Complainant's statement of facts in its Motion for Summary Decision and from Respondent's introduction and summary of facts from its Motion for Partial Summary Decision, to the degree that the two statements do not differ or contradict one another and are supported by the record, *see* 28 C.F.R. § 68.38; Fed. R. Civ. P. 56(c)(1).

Also on July 22, 2014, DHS served Respondent with a Notice of Suspect Documents (or NSD). Complainant's Mot. Summ. Dec. at 9449-91, Ex. G-64.²

On November 13, 2014, DHS served Respondent with a second Notice of Suspect Documents. Compl. Mot. Summ. Dec., Ex. G-65.

The parties settled on December 15, 2015. Complainant's Mot. Summ. Dec., Ex. G-7 at 12, G-69.

Respondent's Efforts After First Inspection

Following the first inspection, Respondent implemented new practices to assist with employment authorization checks. The Respondent: 1) "[c]entraliz[ed] the I-9 completion process in its offices with trained employees;" 2) "[i]mplement[ed] an electronic I-9 system (Tracker I-9 Complete) and train[ed] employees on the system;" 3) "[p]rovid[ed] I-9 and immigration compliance training to employees completing the Form I-9 on behalf of the company;" and 4) "[c]onduct[ed] internal I-9 reviews and correct[ed] errors identified during the internal audit process." Resp't's Mot. Part. Summ. Dec., Ex. 1 at ¶ 7; *id.*, Ex. 6 (memorandum from Respondent's attorney describing Respondent's review and auditing process); *id.*, Ex. 9 (internal communication regarding I-9 training with respondent's attorney).

Respondent also conducted an internal audit of their Forms I-9. Resp't's Mot. Summ. Dec., Ex. 1 at ¶ 10; *id.*, Ex. 8; Complainant's Mot. Summ. Dec., Ex. G-25.³

In addition, Respondent created a flag in its payroll system to alert the company if a person who previously worked at Respondent and who was associated with a suspect document, per DHS's November 2014 letter, attempted to seek reemployment. Resp't's Mot. Part. Summ. Dec., Ex. 1 ¶ 14, *id.*, Ex. 6 at 3.

Respondent asserts that its screen for former employees with suspect documents was imperfect. Not all persons identified on the Notice of Suspect Documents were entered into Respondent's screening database. Also, Respondent human resources personnel did not always turn on the alert notification for prospective employees who were identified as having suspect documents. Resp't's Mot. Part. Summ. Dec., Ex. 1 ¶ 16. Additionally, Respondent did not always process prospective employees through the centralized hiring system it had created, opting instead

² The first Notice of Suspect Documents listed Employees 1, 3, and 4 now listed in Count X of the Amended Complaint. Complainant's Mot. Summ. Dec., at 94545, 9477, 9486.

³ In the process of this internal audit, Respondent appears to have changed the reference number for some List A documents to the USCIS receipt number (REC Number) rather than the Alien Registration Number (A Number) on certain Forms I-9. Complainant's Mot. Summ. Decision at 10065, Ex. G-77, *id.* at 7769-7771, Ex. G-26. List A documents are "[d]ocuments establishing both employment authorization and identity." 8 U.S.C. § 1324a(b)(1)(B). Acceptable documents include a "United States passport; resident alien card, alien registration card, or other document designated by the Attorney General, if the document" meets certain requirements. *Id.* at § 1324a(b)(1)(B)(i)-(ii); *see also* 8 C.F.R. § 274a.2(b)(1)(v)(A) (specifying acceptable documents that are "acceptable to evidence both identity and employment authorization.").

to delegate that authority to the agricultural field supervisors. Those persons did not have access to the alert system. As a result, some flagged former employees were rehired. Respondent asserts that many of the people who were erroneously hired were terminated shortly thereafter. *Id.*, Ex. 1, ¶ 18-20.

Employees Rehired Between Inspections

Respondent hired the seven employees listed in Count VIII. It completed Forms I-9 for those employees, noting a work authorization document with an expiration date in Section 2. Suppl. Exs. Mot. Summ. Dec. at 2054-73, Ex. G-15. The listed employees' work authorizations then expired and there was a gap between each employee's work authorization expiration and an extension of work authorization by USCIS. *Id.* The listed employees continued to receive wages and/or paychecks during the period in which they were not authorized to work. *Id.*

Second Inspection and Notice of Intent to Fine

DHS served Respondent with a second Notice of Inspection on May 1, 2017. Complainant's Mot. Summ. Dec. at 9174, Ex. G-45; Resp't's Mot. Part. Summ. Dec. 4, *id.* at Ex. 3. The parties agreed that Respondent would share the requested documents on May 12, 2017. Complainant's Mot. Summ. Dec. at 9141, Ex. G-36.

Complainant's I-9 audit protocols included using software which tracks all changes made to the electronically stored Forms I-9. These "audit trail" records are effectively metadata for the Forms I-9s, creating a log of when they were created, who accessed them, when they did so, what modifications were made, and by whom. *See* Complainant's Mot. Summ. Dec. at 9133, Ex. G-32 ("Generally, an audit trail is a record showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time[.]") (Exhibit is a copy of 8 C.F.R. § 274a.2(e)); Resp't's Mot. Part. Summ. Dec., Ex. 12 (An audit trail "provides a historical record of who accessed the document, date and time of entry, description of the entry or field, the process made . . . and Section updated.").

Complainant received paper and electronic Forms I-9 from Respondent on May 12, 2017, some with audit trails, others without. Complainant's Mot. Summ. Dec. at 170, Ex. G-4; *id.* at 10052-53, Ex. G-77 (noting that on May 12, 2017 "two boxes of Forms I-9 and other information was provided" by Respondent).

Respondent asserts that some audit trails were not provided to DHS due to a technical issue. Resp't's Resp. Mot. Summ. Dec., Ex. A at ¶ 5.

On June 20, 2017, ICE Auditor Daniel Sullivan notified Respondent of the missing audit trails. Complainant's Mot. Summ. Dec. at 10058, Ex. G-77, *id.* at 9155, Ex. G-39. On June 26, 2017, Respondent provided 142 missing audit trails.⁴ Resp't's Resp. Mot. Summ. Dec., Ex. C at 2.

⁴ The missing audit trails relate to counts XI and XII of Complainant's Second Amended Complaint.

Complainant compiled a spreadsheet regarding the electronic Forms I-9 received, notating A Numbers,⁵ REC numbers,⁶ the Section 2 employer representative, the List A document REC number expiration date, and the time computed by the Section 1 sign date. Complainant's Mot. Summ. Dec. at 9; *see id.*, Exs. G-47-54.

Complainant noted in its internal review of Respondent's records that many of the REC numbers and A numbers used on the Forms I-9 were either sequential or numbers where one digit was transposed. Complainant's Mot. Summ. Dec., at G-3, G-4, G-14, 47-52, G-77. Complainant found similar patterns with the expiration dates of the documents. *Id.* Complainant concluded that the occurrences were too frequent to be coincidental. Complainant's Mot. Summ. Dec., at 9.

Mr. Sullivan identified the following concerns with the data he received: (1) Forms I-9 completed by a "Preparer/Translator" were electronically signed in Section 1 by the preparer instead of the employee; (2) the audit trails showed the preparer as the person who signed Section 1; (3) for Forms I-9 presented after June 26, 2017, the audit trails were changed to show that the Section 1 signature was completed by the employee; (4) two new Forms I-9 were originally presented with audit trails, but when Complainant mistakenly requested the audit trail, the second one presented different from the first; (5) the audit trails presented after June 26, 2017 differed from ones provided prior; and (6) the "authenticity of the [audit trails] was shown to be a failure." Complainant's Mot. Summ. Dec. at 37.

DHS served a Second Notice of Suspect Documents on Respondent on April 10, 2019, Complainant's Mot. Summ. Dec., Ex. G-63, Resp't's Mot. Part. Summ. Dec. at 4.

On May 26, 2021, DHS served Respondent with a Notice of Intent to Fine (NIF). Complainant's Mot. Summ. Dec., Ex. G-2.

III. SUMMARY DECISION STANDARD

Under OCAHO's Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024), the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that

⁵ An "A number" is an Alien registration number, or a unique seven, eight, or nine digit number DHS assigns to an alien. U.S. Citizenship and Immigration Services, A-Number/Alien Registration Number/Alien Number (A-Number or A#), <https://www.uscis.gov/glossary-term/50684>.

⁶ A "REC number" is a USCIS Receipt number, or a unique 13 character identifier that USCIS assigns to track individual applications or petitions, including those for work authorization. U.S. Citizenship and Immigration Services, Receipt Number, <https://www.uscis.gov/glossary-term/66907>. Complainant asserts that the REC numbers have a particular meaning, that "the first three letters in the series . . . show the USCIS processing service center where the receipt is issued . . . the next two digits signify the fiscal year the receipt was issued . . . the next three digits represent the computer workday on which the receipt was processed, and the fee was taken for the application . . . the final five digits are unique identifiers for the petition or application associated with the relief." Complainant's Mot. Summ. Dec. at 9-10.

a party is entitled to summary decision.” 28 C.F.R. § 68.38(c).⁷ “An issue of material fact is genuine only if it has a real basis in the record” and a “genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit.” Sepahpour v. Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

“Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution.” United States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). “[T]he party opposing the motion for summary decision ‘may not rest upon the mere allegations or denials’ of its pleadings, but must ‘set forth specific facts showing that there is a genuine issue of fact for the hearing.’” United States v. 3679 Com. Place, Inc., 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). Further, if the government satisfies its burden of proof, “the burden of production shifts to the respondent to introduce evidence . . . to controvert the government’s evidence. If the respondent fails to introduce any such evidence, the un rebutted evidence introduced by the government may be sufficient to satisfy its burden[.]” United States v. Durable, Inc., 11 OCAHO no. 1231, 5 (2014) (CAHO Order) (internal citation omitted). All facts and reasonable inferences are viewed “in the light most favorable to the non-moving party.” United States v. Primera Enters., Inc., 4 OCAHO no. 615, 259, 261 (1994) (citations omitted). Finally, “[w]hen a party who would bear the burden of proof at trial is unable to make a showing sufficient to establish an element essential to that party’s case, summary [decision] against that party will ensue.” Brown, et al. v. Pilgrim’s Pride Corp., 14 OCAHO no. 1379a, 12 (2022) (quoting Angulo v. Securitas Sec. Servs. USA, Inc., 11 OCAHO no. 1259, 8 (2015)); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The Ninth Circuit, under whose jurisdiction this case arises,⁸ has made clear that “when parties submit cross-motions for summary judgment, [e]ach motion must be considered on its own merits.” Fair Hous. Council of Riverside Cnty, Inc. v. Riverside Two, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting William W. Schwarzer, et al., The Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441, 499 (Feb. 1992)); *see also* Li Zu v. Avalon Valley Rehab. Ctr., 14 OCAHO no. 1376, 4 (accord). “[E]ach movant has the burden of presenting evidence to support its motion that would allow the district court, if appropriate, to direct a verdict in its favor.” High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990) (quoting Barhold v. Rodriguez, 863 F.2d 233, 236 (2d Cir. 1988)) (abrogated on other grounds). “The fact that one party fails to satisfy [their summary decision] burden on his own . . . motion does not automatically indicate that the opposing party has satisfied its burden and should be granted summary judgment on the other motion.” 10A Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 2720 (4th ed. 2024).

IV. LEGAL STANDARDS FOR ESTABLISHING LIABILITY UNDER § 1324A

⁷ OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024). The rules are also available through OCAHO’s webpage on the United States Department of Justice’s website. *See* <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations>.

⁸ Since the allegations at issue in this case occurred in Arizona, the Court may look to the case law of the relevant United States Court of Appeals, here the Ninth Circuit. *See* 28 C.F.R. § 68.57.

“In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements.” United States v. Metro. Enters., Inc., 12 OCAHO no. 1297, 7 (2017). The government also has the burden of proof with respect to the penalty; it also “must prove the existence of any aggravating factor by the preponderance of the evidence[.]” Id. (quoting United States v. Niche, Inc., 11 OCAHO no. 1250, 6 (2015)) (internal citations omitted).

a. Failure to Prepare and Failure to Present Violations

“Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986,” and employers must produce the Forms I-9 for government inspection upon three days’ notice. Metro. Enters., 12 OCAHO no. 1297 at 7 (citing, *inter alia*, 8 C.F.R. § 274a.2(b)(2)(ii)).⁹ An employer must ensure that an employee completes section 1 of the I-9 on the date of hire and the employer must complete section 2 of the Form I-9 within three days of hire. United States v. A&J Kyoto Japanese Rest., Inc., 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. §§ 274a.2(b)(1)(i)(A), (ii)(B). “Employers must retain an employee’s I-9 for three years after the date of hire or one year after the date of termination, whichever is later.” United States v. Imacuclean Cleaning Servs., LLC, 13 OCAHO no. 1327, 3 (2019) (citing 8 C.F.R. § 274a.2(b)(2)(i)(A)).

“Failures to satisfy the requirements of the employment verification system are known as ‘paperwork violations,’ which are either ‘substantive’ or ‘technical or procedural.’” Metro. Enters., Inc., 12 OCAHO no. 1297 at 7 (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm’r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (Virtue Memorandum)). As explained in United States v. WSC Plumbing, Inc., 9 OCAHO no. 1071, 11 (2001), dissemination of the Virtue Memorandum to the public may be viewed as an invitation for the public to rely on it as representing agency policy. While this office is not bound by the Virtue Memorandum, the Government is bound by it, and failure to follow its own guidance is grounds for dismissal of those claims. Id. at 12. With respect to technical or procedural violations, the employer must be given a period of not less than ten business days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A)–(B).

b. Knowing Hire Violations and Knowingly Continue to Employ Violations

Under 8 U.S.C. § 1324a(a)(1)–(2), it is unlawful for an employer to “hire . . . an alien knowing the alien is . . . unauthorized” to work in the United States and “to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to employment.” *See also* United States v. Foothill Packing, Inc., 11 OCAHO no. 1240, 8 (2015). Therefore, the “government must show either that the company knew, or that it should

⁹ “Any person or entity required to retain Forms I-9 in accordance with this section shall be provided with at least three business days notice prior to an inspection of Forms I-9 by officers of an authorized agency of the United States. At the time of inspection, Forms I-9 must be made available in their original paper, electronic form, a paper copy of the electronic form, or on microfilm or microfiche at the location where the request for production was made.” 8 C.F.R. § 274a.2(b)(2)(ii).

have known, that the employee[s] ... [were] unauthorized to work in the United States at the date of hire” or became unauthorized to work during their employment. *Id.* at 9.

“Regulations define ‘knowing’ as including both actual and constructive knowledge[.]” *Foothill Packing, Inc.*, 11 OCAHO no. 1240, at 8. Specifically, 8 C.F.R. § 274a.1(l)(1) explains that “[t]he term knowing includes not only actual knowledge but also knowledge which may fairly be inferred” by the surrounding facts and circumstances. “The basic principle underlying the doctrine of constructive knowledge . . . in OCAHO case law is that the employer is not entitled to cultivate deliberate ignorance or avoid acquiring knowledge.” *United States v. Muniz Concrete & Contracting, Inc.*, 12 OCAHO no. 1278, 7 (2016) (quoting *Foothill Packing, Inc.*, 11 OCAHO no. 1240, at 9).

V. ANALYSIS

a. Counts VII, IX: Knowingly Hiring Unauthorized Persons

The parties cross-move for summary decision with respect to whether KLJ knew or should have known that the employees listed in Counts VII and IX were not authorized to work when it hired them. Compl. Mot. Summ. Dec. 23–31; Resp’t Mot. Summ. Decision 20–26.

1. Standard of Law

Pursuant to 8 U.S.C. § 1324a(a)(1)(B), “[i]t is 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 . . . with respect to such employment . . .” “The government must show either that the employer knew, or should have known, an employee was unauthorized to work in the United States at the time of hire.” *United States v. Bazan’s Enterprises, Inc.*, 15 OCAHO no. 1408, 3 (2021) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 140–41 (1997)).

As with knowingly continuing to employ, a knowing hire may be based on actual knowledge or constructive knowledge. *See United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 8 (2015); *see also United States v. Valdez*, 1 OCAHO 91, 598, 608 (1991).

2. Count VII

Complainant argues that “[t]he evidence in Count VII shows a distinct pattern by KLJ in its Section 2 verification of all [424] I-9’s that it knowingly hired the individuals in violation of section 274A(a)(1)(A) of the INA.” Complainant’s Mot. Summ Decision 25.¹⁰ Specifically, “[t]he use of fraudulent numbers, the repetition or near repetition of the numbers by a small group of KLJ [signers] and the timing of the use of those numbers all show a strong indication that there is possible collusion . . . in that [KLJ’s Section 2 signers] are either creating or complicit in using these fraudulent [documents].” *Id.* at 28. Complainant contends that all the employees in Count VII were on the notice issued during the second inspection, but “[t]here is no indication that KLJ

¹⁰ Complainant’s Motion for Summary Decision was filed prior to the filing of the Second Amended Complaint and originally refers to the numbers of individuals in the Counts in the First Amended Complaint.

ever employed any proper review of the documents to show that it was in compliance with the regulations and law.” *Id.* at 29.

In cross moving for summary decision, Respondent argues that Count VII is “based on a theory of constructive knowledge – that the Company should have been aware that more than one employee presented a permanent resident card with the same USCIS receipt number (‘REC number’) as another employee, or a document number in sequence with another employee’s document number.” Resp’t Mot. Summ. Decision 9.

Respondent argues that the only way for an employer to identify duplicate REC, A numbers, or Social Security numbers would be for the employer to create a database, which it contends is not required under the statute. *Id.* at 9–10. Respondent further argues that more stringent employee screening tools would risk discriminating against its potential employees on the basis of their national origin or citizenship status. *Id.* at 10. Respondent argues that the documents it received appeared on their face to be authentic, and as such Complainant has not met its burden of showing that Respondent has constructive or actual knowledge that it was employing undocumented persons. *Id.* at 17, 21.

Complainant’s theory of liability in Count VII presents a question of first impression: whether evidence of widespread duplicate or sequential REC numbers on ID documents are sufficient to meet the government’s burden of showing constructive knowledge on the part of an employer that an employee is not authorized to work at the time of hire. The Court finds that, in this circumstance, the evidence is insufficient to show no question of material fact.

The courts have found that employers are chargeable with knowing that their employees are unauthorized to work by direct knowledge, i.e. an employee tendering an expired document, and through recklessness, for instance in the employer’s failure to review the document to determine whether it appeared genuine. *See United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 11 (2015); *United States v. Occupational Resources Management Co.*, 10 OCAHO no. 1166, 10-11 (2013), *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 29–31 (1998); *see also United States v. American Terrazzo Corp.*, 6 OCAHO 877, 576, at 586-87 (1996) (finding constructive knowledge where the employee told her employer she was a foreign student, and the employer completed Section 1 of the Form I-9, and her social security card on its face stated that it was not valid for work in the US).

However, the courts have also made clear that employers are not required to have expertise in detecting whether identification is fraudulent. In *Collins Food International, Inc. v. INS*, 948 F.2d 549, 552-555 (9th Cir. 1991), the Ninth Circuit reversed a lower court ruling finding that the employer is chargeable with a violation of § 1324a when the employer failed to detect that the employee’s social security card had been forged after comparing it with the INS sample in the Handbook for Employers. Citing the House Judiciary Committee Report in its creation of § 1324a, the court states:

[i]t is not expected that employers ascertain the legitimacy of documents presented during the verification process [...] [t]he ‘reasonable man’ standard is to be used in implementing this

provision and the Committee wishes to emphasize that documents that reasonably appear to be genuine should be accepted by employers without requiring further investigation of those documents.

Id. at 554.

In this matter, Complainant argues that Respondent either knew or should have known that the employees in Count VII were unauthorized to work, as evidenced by the fact that many of the REC numbers and A numbers were repeated or sequential/similar, and because a small number of Respondent's employees were entering these REC numbers in quick succession.

However, the proffered evidence does not meet the summary judgment standard. Addressing first the proposition that Respondent should have known that the documents were fraudulent, the evidence on this point is sparse. While a reasonable person might wonder about these apparent discrepancies, and might reasonably conclude based on them that Respondent was aware that it was employing undocumented persons, considering the evidence in the light most favorable to the non-moving party, the evidence does not compel this conclusion. One might also conclude from the bare record that the similarity of the REC numbers, or their repetition, might have been a product of a clerical error, or of chance rather than evidence of an intention to unlawfully hire or of wanton and reckless disregard for the law. Assuming *arguendo* that Respondent correctly input data concerning its employees, Complainant offers no evidence reflecting the statistical unlikelihood of persons with sequential identification numbers seeking employment from the same employer around the same timeframe.¹¹

Moreover, there is a fundamental question as to the nature and abilities of the electronic database that Respondent put in place following its first inspection. Respondent argues that no federal law requires it to use an electronic I-9 data storage system, which is correct. However, the evidence in this case is that Respondent voluntarily employed some form of an electronic database, and it conducted at least one audit of its I-9s using the database. To the extent that Respondent, through this electronic system, became aware of the use of fictitious identification numbers and it did nothing, or to the extent this information was readily available to Respondent and yet it took no action, Respondent would be arguably conscious of, or acting in reckless disregard to, its employment of undocumented persons. However, neither party has proffered evidence discussing how the system works, whether it is even capable of identifying duplicate or sequential REC or A numbers, and whether Respondent ever queried the system to gather this information.

¹¹ The courts have used statistical evidence in weighing whether the employer intended the action they undertook (rather than it occurring by chance) in many contexts; the most directly relevant, in the undersigned's opinion, occurring in the context of Title VII litigation. *See, e.g., Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 339 (1977) ("[O]ur cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."); *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (discussing the use of statistical evidence in employment discrimination cases); *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984) (using regression analysis to evaluate whether an employer purposefully discriminated against its African American employees); *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1223 (10th Cir. 2013) (discussing statistical significance in the context of a Title VII employment discrimination case); *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 550 (9th Cir. 1982) (summarizing that statistical evidence is relevant and admissible at prima facie stage of disparate treatment employment discrimination cases); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1363 (9th Cir. 1985) (same).

Complainant has asserted that it used an excel spreadsheet, among other methods, to identify duplicate or sequential numbers. The record is devoid of evidence as to how, apart from conversations among the people Complainant asserted were responsible for the entry of a significant amount of the data for its new personnel, it would similarly have become appraised of the potentially fictitious identification.

While “the knowledge element can be established through circumstantial evidence,” United States v. Bhattacharya, 14 OCAHO no. 1380, 7 (2020) (citing United States v. Carpio-Lingan, 6 OCAHO no. 914, 11 (1997)), the evidence does not establish that Respondent was willfully blind to an employee’s unauthorized status. The caselaw directs that “[c]onstrutive knowledge’ must be narrowly construed,” United States v. R&SL Inc., 13 OCAHO no. 1333b, 47 (2022), given IRCA’s delicate balance to prevent the employment of unauthorized workers while avoiding discrimination, Collins Foods Int’l, Inc., 948 F.2d at 554-55.

In short—Complainant would have the Court conclude that “on its face” the sequential or near sequential REC numbers, and their inclusion instead of other unique identifiers, creates an un rebuttable presumption that Respondent knew it was hiring undocumented persons in violation of the statute. However, without additional evidence from Complainant the record permits several other inferences. This, in turn, prohibits a finding of liability at this stage.¹²

Similarly, the Court denies summary decision to Complainant’s argument that a finding of liability is warranted because Respondent intentionally entered false identification information for its employees. This is a contested issue of fact. Complainant asserts that an interview of Respondent’s HR staff revealed they did not request or check employee identification before hiring, in contravention of § 1324a. Complainant’s Mot. Summ. Dec. at 10. Respondent offers affidavit testimony from its CEO that the company has a practice of physically inspecting each piece of identification provided to it, and strictly complying with its obligation to check identification documents in compliance with § 1324a. Resp’t’s Mot. Summ. Dec. Ex. 1, ¶ 13, 24-26. Neither party presents the testimony of the people who actually input the data. This issue is contested, and it therefore can only be resolved through weighing the credibility of the conflicting evidence.

Addressing Respondent’s cross motion for summary decision, the proffered evidence similarly does not establish that there is no material question of fact as to whether Respondent engaged in a reasonable review of the identification and work authorization documents. Respondent contends that it was not obliged to create a system to track the ID numbers of its employees, however the evidence at this stage of the proceedings indicates that Respondent did enroll in such a system of its own volition following the first inspection. Respondent contends that any errors with regard to its identifying flagged employees are likely the product of clerical mistakes, however Respondent offers no evidence to support this claim. Therefore, the Court

¹² The Court need not reach the merits of Complainant’s argument that the sequential REC numbers could not have been produced by a document vendor because the Complainant’s evidence concerning the sequential REC numbers as evidence of Complainant’s knowledge of hiring undocumented persons is not sufficient, or sufficiently uncontested, to eliminate it as a triable question of fact. *See* Complainant’s Mot. Summ. Dec. at 11, 28-29, Ex. G-77 (discussing Complainant’s review of NSDs in the Phoenix metropolitan area from 2014-2015). However, the Court notes that Complainant’s arguments on document vendors appears to rely on expert testimony; accordingly, the parties would be obliged to present evidence in keeping with Federal Rule of Civil Procedure 26(a)(2) concerning the basis of the expert’s conclusions. 28 C.F.R. § 68.40; Fed. R. Evid. 701, 702; Fed. R. Civ. P. 26(a)(2).

likewise does not find that Respondent has shown no question of material fact that it or its agents had no actual or constructive knowledge of the unauthorized status of these employees.

For both motions, the “circumstantial evidence . . . is too weak to sustain on a motion for summary decision where all reasonable inference must be accorded the non-moving party[.]” United States v. American Terrazzo Corp., 6 OCAHO no. 828, 59, 65 (1995). The Court is cognizant that “with respect to the contentions as to both actual and constructive knowledge, summary decision generally is inapposite when there are issues concerning the state of mind of a party,” and “summary judgment is generally an inappropriate method of resolving an issue of this type.” Id.

Accordingly, the Court finds that the evidence presented leaves a question of material fact for a hearing. As such, both Complainant and Respondent’s Motions for Summary Decision as to Count VII are DENIED.

a. Count IX

Count IX consists of 11 employees who were identified on the 2014 Notice of Suspect Documents, left employment with Respondent after the third quarter of 2014, and were rehired during the first quarter of 2015 or after. Second Amended Compl. 25; Complainant’s Mot. Summ. Dec. 30.¹³ Complainant contends that “[t]here is no evidence that KLJ attempted to get corrected identity documents that would allow their individuals to be authorized to work in the U.S.” Complainant’s Mot. Summ. Dec. Complainant further contends that because “these individuals were already identified on the [Notice of Suspect Documents] list, KLJ should have known that these individuals were not authorized to work in the United States.” Id. As a result, Complainant contends that the persons in Count IX were either knowingly rehired despite their unauthorized status, or that Complainant was reckless in its decision to rehire them.

Respondent counters that it created a system to identify and weed out applicants on the Notice of Suspect Documents list. It argues that in some instances, the persons on the NSD list worked for a “few hours or days” before being processed through the payroll system, and then were terminated after being identified. Resp’t Mot. Summ. Dec. at 24. In other instances, Respondent “inadvertently did not flag” some individuals previously subject to a prior Notice of Suspect Documents. Id. at 23–24. It argues that its creation of this personnel system absolves it of liability, and cross moves for summary decision with regard to Count IX.

The parties do not dispute that Complainant established a system to identify and refuse employment to undocumented persons after the first DHS investigation. The parties also do not dispute that there are many differences between the information provided in the Notice of Suspect Documents and in the employee files for the persons identified in Count IX. They include:

¹³ Count IX originally consisted of 72 individuals. In the First Amended Complaint, Count IX was reduced to 22 individuals. In the Second Amended Complaint, Count IX was further reduced to 11 individuals. The employee reference numbers utilized are from the Second Amended Complaint.

- For Employee 8, the first name identified in the Notice of Suspect Documents is the same as the employee's last name on the Form I-9, three digits of the Social Security Numbers differ, and A Numbers are different.
- For Employee 9, in the June 2014 Notice of Suspect Documents, the first name identified for the employee is spelled differently and identified as one of the employee's last names (with a separate first name that does not appear in the Notice of Suspect Documents), the last four digits of the Social Security Numbers differ between the Notice and the Form I-9, and the A Numbers differ.
- For Employee 11, the first name identified in the Notice of Suspect Documents corresponds to one of the last names identified on the Form I-9 (with a separate first name that does not appear in the Notice of Suspect Documents),¹⁴ the Social Security Numbers have a one number difference, and there is also a one number difference between the A Numbers. Second Amended Compl. 25; Complainant's Mot. Summ. Dec. at 9456, Ex. G-64; Supp. Exs. 2097-2099.

The Court concludes that for the persons identified above the significant differences between the information provided in the Notice of Suspect Documents and the employee records prevent Respondent from being sufficiently aware of the employees' status to sustain a charge of knowing hiring of unauthorized persons. For each, there was no match on a unique identifier (i.e. a SSN or A number) and Respondent employed too many people with too frequent of turnover to permit an inference that the Respondent could positively identify these persons based on their name alone.

Concerning the remaining persons identified in Count IX, the parties have a substantive dispute about whether Respondent engaged in a reasonable inquiry into whether the documents were fraudulent.¹⁵ Complainant contends that Respondent "turned a blind eye" to its unauthorized workers, and that in the context of DHS's prior investigation and consent decree Respondent's failure to summarily refuse employment to the persons identified was a "knowing act." Respondent counters that these hires resulted from an administrative oversight in entering 1,675 persons into its screening database. Resp't's Resp. Mot. Summ. Dec. 24-25.

Missing from either party's argument is a discussion of the frequency with which the alleged administrative errors occurred (one perhaps keyed to an industry standard to determine whether the error rate was statistically significant), a discussion about Respondent's methods for identifying errors and correcting them (i.e. through an audit or other secondary review),¹⁶ and a

¹⁴ There are two individuals listed on the June 2014 Notice of Suspect Documents with the same last name and first name. Complainant's Mot. Summ. Dec. at 9456, 9473. It appears that Complainant is discussing the individual listed earlier in the June 2014 Notice of Suspect Documents, based on the Social Security number and A number descriptions.

¹⁵ In the Second Amended Complaint, Employees 4 and 10 appear to be the same individual, as they have the same first and last names and the Social Security Numbers listed on the Forms I-9 provided are the same. Second Amended Compl. 25; Supp. Exs. 2081; Supp. Exs. 3341. There can only be one charge for the same individual.

¹⁶ Respondent includes in its opposition to Complainant's Motion for Summary Decision Exhibit 7, which appears to be the sections of the Respondent's electronic I-9 vendor's website which discuss its product. Unfortunately, the

statement from the persons either inputting the information, who supervised the data input, or who reviewed the data input after the fact attesting to their good faith efforts. Without this information, the Court is incapable of coming to a legal or factual conclusion about whether Respondent acted reasonably to prevent the rehiring of persons who it was previously advised had suspect documents.

The need for this information is particularly acute in the case presently before the Court, where Respondent has admitted that it at times did not enter all of the information for flagged persons into its database, it at times did not turn on the system to alert it to hiring persons who had been flagged, and it at times did not feed new applicant data into its centralized system to alert it to their potentially undocumented status.

Finally, addressing the seven persons in Count IX who Respondent contends were employed for less than three business days, Respondent argues that liability should not apply to them as 8 U.S.C. § 1324a and its regulations requires that an I-9 be completed within three days of employment and these persons were terminated before that deadline. Complainant counters that Respondent had previously admitted to violating § 1324a when it entered into a consent agreement, and that it presumably should be held to a heightened standard of more diligently identifying and screening out persons who are unauthorized to work.

Without addressing the heightened standard argument, in part because neither party identifies a section of the 2014 settlement agreement addressing this claim,¹⁷ the Court notes that 8 C.F.R. § 274a.2(b)(1)(ii) provides that an employer has within three business days of the employee's employ to review and complete the attestation section of the Form I-9, and that pursuant to 8 C.F.R. § 274a.2(b)(1)(iii) an employer that hires an employee for less than three days must still complete the employee verification information. *See also United States v. Two for Seven, LLC, d/b/a Black and Blue Rest.*, 10 OCAHO no. 1208, 4 (2014). Neither the statute nor regulation speak to the proposition Respondent asks the Court to accept—that the three days is effectively a safe harbor for employers to demand the relevant documents from an employee, review them, determine that they are false, and terminate the employee without incurring liability under § 1324a. Neither party cites any caselaw for this proposition, and the Court has found none addressing it.

It is certainly conceivable that an employer operating in good faith, especially one with a large labor force and high employee turnover, might require three days to process, vet, and reach a decision about the tendered documents and their prospective employees' work status. This Court's guideposts in Collins Food and SKZ speak both to the "reasonableness" of the inquiry into

sections addressing compliance and audit are brief, and the text is cut off at the end. Respondent's Exhibit 8, titled "Sample of I-9 Audit Memo from Internal Audit" appears to show an audit of a paper copy of several Forms I-9, which does not shed light on Respondent's audit of its electronically stored I-9 information.

¹⁷ The Court notes that Complainant's Exhibit G-69 to its Motion for Summary Decision includes a copy of the 2014 settlement agreement. Complainant highlights paragraph four, in which the Respondent agrees "that the violations of the stated Notice are a first offense and that future violations of § 274A of the Act ... will be treated as having been committed by an employer with a history of previous violations." However, this appears to relate to the Department's penalty calculations for subsequent violations of the Act, rather than imposing a heightened due diligence obligation on Respondent.

the documents, as well as avoiding a “reckless disregard” of their obligations under § 1324a. This caselaw, as well as the regulation’s directive of three days, militate towards a conclusion that all else being equal an employer may perform a reasonable inquiry within that timeframe and reject an applicant without creating liability. This conclusion draws additional support from the language in Collins Food about the potential consequence of a higher than “reasonable person” standard for the review of identification documents leading to discrimination on the basis of national origin. Collins Food, 948 F.2d at 554 (“IRCA, as we have pointed out, is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens.”). Requiring an employer to immediately decide whether a document is false or legitimate, with no opportunity for reflection or to consult its own database or materials supplied by DHS to aid in the detection of fraudulent documents, would create a perverse incentive for employers to be overinclusive in terminating employees who might otherwise be authorized to work in the United States.

However, this conclusion presumes a showing of good faith and regularity with regard to the employer’s hiring operations. An employer who, for instance, intentionally hired undocumented persons but terminates them after their third day of employment, would notwithstanding the regulation have violated the statute’s prohibition against an employer “hir[ing] ... for employment in the United States an alien knowing the alien is an unauthorized alien,” 8 U.S.C. § 1324a(a)(1). Similarly, an employer who maintained a reckless disregard for the employment status of its employees, but that terminates its employees on the third day, is chargeable with having knowingly hired an undocumented person for the same reason.

In the matter presently before this Court, the record at the dispositive motions phase concerning the remaining Count IX employees is not sufficiently clear for the undersigned to either conclude that the Respondent implemented a reasonably effective system in good faith, or that it hired the employees in conscious disregard for the law.

Accordingly, the Court GRANTS Respondent’s motion with regard to persons 8, 9, and 11 of Amended Count IX.

The Court DENIES Complainant and Respondent’s cross-motions for all other persons in this count (persons 1-7 and 10).

b. Knowing Hire and Continue to Employ Violations

The parties cross-move for summary decision as to the violations at issue in Counts VIII and X.

i. Counts VIII, X: Knowingly Continued to Employ

Complainant argues that the Court should grant summary decision with respect to Counts VIII and X of the Second Amended Complaint because Respondent knew or should have known

that these employees were unauthorized to work in the United States and nonetheless continued to employ them. With regard to Count VIII, Complainant argues that the violation occurred due to the employees' work authorizations expiring, Complainant notifying Respondent of the expiration of their data, and Respondent failing to take steps to reverify their employment status. Concerning Count X, Complainant argues Respondent continued to employ four persons after receiving Complainant's letter stating that those persons had documents that did not match their identities (a "No Match" Letter).

Respondent opposes the motion, arguing that it "did not have constructive knowledge because there is no evidence that the Company 'deliberately avoided learning the truth' or 'took deliberate actions to avoid confirming a high probability of wrongdoing.'" Resp't's Resp. Mot. Summ. Dec. 26 (citing Complainant's Mot. Summ. Dec. at 32-33).

Respondent also cross-moves for summary decision for Count X, arguing that the prior Notice of Suspect Documents did not create constructive knowledge that these employees were unauthorized to work. Resp't Mot. Partial Summ. Decision 23-26.

1. Constructive Knowledge of Violations

The resolution of the parties' cross motions largely depends on determining what level of knowledge is sufficient to hold Respondent legally accountable for the undocumented workers that Respondent employed.

8 U.S.C. § 1324a(a)(2) directs that it is "unlawful for a person or other entity, after hiring an alien for employment . . . 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." (emphasis added).

Respondent argues that it did not know that some of its employees became ineligible for employment. Insofar as neither party has made an argument for Respondent having direct knowledge of its employee's work status, the Court evaluates whether the documents' expiration meets the standard of constructive knowledge.

8 C.F.R. § 274a.1(l) defines constructive knowledge as:

(1) [...] knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

- (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
- (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor

Certification and/or an Application for Prospective Employer; or

(iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

OCAHO has found that an employer has “‘constructive knowledge of the alien worker’s unauthorized status’ when the ‘employee wrote the expiration date for his employment authorization document in section 1 of the Form I-9 and the employer failed to reverify the individual’s work authorization prior to the expiration date of the document.’” United States v. El Paso Paper Box, Inc., 17 OCAHO no. 1451, 14 (2022) (quoting United States v. Muniz Concrete & Contracting, Inc., 12 OCAHO no. 1278, 8–9 (2016), and collecting cases). “OCAHO precedent dictates that [a respondent has] constructive knowledge that it continued to employ [an] individual despite his lack of work authorization because it inputted the employee’s employment authorization card and its corresponding expiration date . . . in Section 2 of the employee’s I-9.” Id.

2. Count VIII (Expired Work Authorization Documents)

Respondent hired the seven persons in Count VIII, entering the expiration date of their work authorization documents into Section 2 of the Form I-9. Later, the work authorization document expired, and there was a gap between the expiration date and the extension of their work authorization. During that gap, Respondent continued to pay the employees’ wages. *See* Ex. G-15 (containing Forms I-9 for each employee with ICE auditor notes, including USCIC Database search results, AZ DES Wages, and KLJ Payroll Register Data).

The Court holds, as with El Paso Paper Box, that Respondent’s awareness of the work authorization documents’ expiration, the employee’s continued employment, along with the employer’s failure to obtain unexpired documents confirming the employee’s ability to work, constitutes constructive knowledge of the employee’s inability to work in the United States.

In the language of the regulation, an employee’s ineligibility to work after the expiration of their work expiration is “readily inferable” from the facts and circumstances. Moreover, an employer exercising reasonable care would note the expiration date of the work authorization document and inquire before the deadline as to whether renewed or additional information was forthcoming. A contrary position would thwart the purpose of the Act, which places the onus on employers to determine whether its employees can work lawfully.

This conclusion necessarily applies in Respondent’s context, where the facts are undisputed that it created a database to capture relevant information about its employees’ employment status following the prior settlement with DHS, and it conducted reviews of this data to determine whether it was in compliance with its obligations under § 1324a.

Complainant has therefore met its burden of constructive knowledge with regard to Count VIII, and Complainant's motion will be GRANTED and Respondent's cross motion denied.¹⁸

3. Count X (Notice of Suspect Documents)

As to the four employees in Count X, Complainant asserts that Respondent either continued to employ or re-hired these persons after receiving a Notice of Suspect Documents informing Respondent that the employees' work authorization documents did not match the identity of the employees.

"A violation of IRCA's 'continuing employment' prohibition, 8 U.S.C. § 1324a(a)(2), occurs when an employer fails to reverify the employment eligibility of one of its workers after receiving specific and detailed information that the worker may, in fact, be ineligible for employment in the United States." United States v. Candlelight Inn, 4 OCAHO no. 611, 212, 223–24 (1994) (citation omitted); *see also* United States v. Occupational Resources Mgmt. Co., 10 OCAHO no. 1166, 5 (2013) ("Generally speaking, when an employer receives specific information that casts doubt on the employment authorization of an employee, and the employer continues to employ the individual without taking adequate steps to reverify the individual's employment eligibility, a finding of constructive knowledge may result."); United States v. Assoc. Painters, Inc., 10 OCAHO no. 1151, 4-5 (2012).

However, "IRCA . . . is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens. The doctrine of constructive knowledge has great potential to upset that balance, and it should not be expansively applied." Collins Foods, 948 F.2d at 554–55 (explaining that if the scope of liability were to be expanded by constructive knowledge, the employer may then "avoid hiring anyone with an appearance of alienage," and therefore, the "doctrine of constructive knowledge must be sparingly applied"); *see also* United States v. Occupational Res. Mgmt. Co., 10 OCAHO no. 1166, 4-5 (2013). Therefore, OCAHO has found that the "context" and "totality of the circumstances" matter in considering whether an employer had constructive knowledge of an employee's unauthorized status, as "simple negligence or carelessness does not satisfy the rigorous standard" for constructive knowledge. United States v. SKZ Harvesting, Inc., 11 OCAHO no. 1266, 11 (2016) (citing Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011)).

This analysis asks four questions: 1) did the employer receive information casting doubt on the employee's authorization to work, 2) was the information sufficient to specifically identify the employee, 3) did the employer continue to employ this employee or reemploy them, 4) without taking steps to reverify the employee's work authorization?

a. Did Respondent Receive Information Concerning Employees Authorization to Work?

As to the first question, the statute does not require that an employer receive information about an employee's unauthorized status in any particular way. Mester Mfg. Co. v. INS, 879 F.2d 561, 566-67 (9th Cir. 1989) (where ICE advised Respondent that three employees were "suspected

¹⁸ Employees 2, 3, 4, and 5 in Count VIII are also listed in Count II. Respondent will be liable for Employee 2 only under Count VIII. Respondent will be liable for Employees 2, 3, and 5 only under Count VIII.

of green card fraud,”); Candlelight Inn, 4 OCAHO no. 611, at 224-27 (ICE agent advising employer that employee social security card was fraudulent); United States v. Noel Plastering & Stucco, Inc., 3 OCAHO no. 427, 318, 321-22 (1991), *aff’d* 15 F.3d 1088 (9th Cir. 1993) (where ICE sent the Respondent a letter identifying the relevant employees); Split Rail Fence Co., Inc. v. United States, 852 F.3d 1228, 1245 (10th Cir. 2017) (same).

In this matter, ICE issued a first Notice of Suspect Documents on July 22, 2014 as part of the First Inspection. Complainant’s Mot. Summ. Dec. at 4; *id.* at 9449, Ex. G-64. The notice advised Respondent that based on the information its employees provided, several appeared not to be authorized to work in the United States. The notice further advised that their documentation did not satisfy the Form I-9 requirements. The notice directed Respondent to “take reasonable actions to verify the employment eligibility of the employees.” *Id.* at 9450, Ex. G-64.

The July 2014 Notice listed Employees 1, 3 and 4 at issue in Count X. Complainant’s Mot. Summ. Dec. at 9454, 9477, 9486, Ex. G-64. Employee 1 worked at Respondent at some point prior to the June 2014 Notice. Respondent hired Employee 3 on September 23, 2014, and despite receipt of the same notice they continued to receive wages throughout Q4 2014 and 2016 through the second quarter of 2017. *Id.*, Ex. G-4, Supp. Exs. at 3005-06, G-17. Employee 4 was hired on February 18, 2014, and notwithstanding the notice they continued receiving wages through 2017. *Id.*, Ex. G-4, Supp. Exs. at 3007-08, G-17.

Complainant sent a second Notice of Suspect Documents on November 13, 2014, containing the same language concerning the potentially unauthorized status of Respondent’s employees. Complainant’s Mot. Summ. Dec. at 4; *id.* at 9492, Ex. G-65. This notice listed Employee 2 in Count X. *Id.* at 9495, Ex. G-65. The record reflects that Employee 2 was re-hired on January 22, 2016, and despite the November 2014 Notice, the employee received his last check in Q4 2017. *Id.*, Ex. G-4, *id.* at 8858, Ex. G-30 (listing Employee 2 in the State Quarterly Report for the quarter ending in March 2016), Ex. G-30; *id.* at 9114, Ex. G-30 (listing Employee 2 in the State Quarterly Report for the quarter ending in December 2017); Supp. Exs. at 3003-04, G-17.

b. Notice Was Sufficient

The Court must next determine whether DHS’s notice was sufficiently clear and unambiguous to put Respondent on notice of it potentially employing persons who were not authorized to work in the United States. The most common way to achieve this notice is by providing the employee’s name and a unique identifier (such as an A number, a social security number, or REC number) that would unambiguously identify the person and provide notice should the employer seek employment in the future.

With Employee 1, the June 2014 Notice listed an individual with the same last name, employee number, and social security number from the Form I-9. Complainant’s Mot. Summ. Dec. at 9454, Ex., G-64, Supp. Exs. 3001-02, Second Amended Compl. at 26.

Employee 2’s first and last names are the same on the November 2014 Notice of Suspect Documents, the Complaint, and the Form I-9 submitted. Complainant’s Mot. Summ. Dec. at 9495, Ex. G-65, Supp. Exs. 2079-80, Second Amended Compl. at 26. Additionally, the Social Security

Number and employee number identified for Employee 2 in the November 2014 Notice of Suspect Document are both the same as in the employee's Form I-9. Complainant's Mot. Summ. Dec. at 9495, Ex. G-65, Supp. Exs. 2079-80.

Employee 3's first name is spelled slightly differently between the June 2014 Notice of Suspect Documents and the Form I-9, but his last name, Social Security Number, and A Number are all the same between the Notice of Suspect Documents and the Form I-9. Complainant's Mot. Summ. Dec. at 9477, Ex. G-64; Supp. Exs. at 3005-06; Second Amended Compl. at 26.

For Employee 4, the June 2014 Notice listed an individual with the same Social Security number, a similar, but not identical name,¹⁹ a different employee number, and a different A-Number to the individual listed as Employee 4 under Count X in the Second Amended Complaint and in the relevant Form I-9. Complainant's Mot. Summ. Dec. at 9486, G-64, Supp. Exs. 3007-08, SAC 26.

The Court finds that for all four employees the unique identifier of the Social Security number in combination with the similarity with the names would give a reasonable employer notice that the person identified in the notice is potentially one of Respondent's employees.

As in United States v. Noel Plastering & Stucco, Inc., 3 OCAHO no. 427, 318, 321 (1991), *aff'd* 15 F.3d 1088 (9th Cir. 1993), these notices identified the relevant employees, reflected ICE's conclusion that the documents the employees used to work did not pertain to them, and expressed ICE's suspicion that they were not authorized to work in the United States. *See also* Split Rail Fence Co., Inc. v. United States, 852 F.3d 1228, 1243 (10th Cir. 2017); *cf.* Aramark Facility Servs. v. Serv. Emps. Int'l. Union, 530 F.3d 817, 826 (9th Cir. 2008) (finding notification of SSN discrepancy did not suffice because it "does not automatically mean that an employee is undocumented or lacks proper work authorization").

c. Continued Employment or Rehire

There is no question of fact that Respondent either continued to employ the persons in Count X, or rehired them after they separated their employment.

d. Failure to Reverify Employment Eligibility

Respondent appears to concede that all four employees in Count X did not have their employment reverified, even though some were flagged for further review. Respondent instead argues that it engaged in a robust system to verify the employment of all its present and future employees following the first DHS investigation. It asserts that these four persons were not flagged, but that infrequent errors sometimes occur with a large business operation involving many

¹⁹ The last name on the June 2014 Notice of Suspect Document is spelled slightly differently than the last name on the Form I-9, and whereas the first name in the Notice of Suspect Documents is a single name, the first name on the Form I-9 is two names (i.e., Ann vs. Mary Ann).

seasonal hires. Respondent further contends that the good faith efforts it put into identifying and rejecting the persons identified in the DHS notice should prevent a finding of liability.

As with the prior analysis concerning the Respondent's efforts at screening employees, the record is devoid of facts from which the Court can determine whether the screening system Respondent created was effective, in the sense that it had a low error rate, that it was comprehensive, or that it was consistently implemented. The absence of this information prevents the Court from properly considering Respondent's defenses. Accordingly, the Court DENIES both the Complainant's and Respondent's motions for summary decision with regard to the employees in Count X.

A. Paperwork Violations

1. Counts XI–XII (Failure to Prepare/Present--Audit Trails)²⁰

Complainant alleges in Counts XI and XII²¹ that Respondent failed to present the audit trails, or metadata, for its Form I-9 upon request. Complainant alleges this failure to present the electronic data violates 8 U.S.C. § 1324a(a)(1)(B). Complainant further argues that when many of the audit trails were eventually produced, they could not be authenticated. Second Amended Compl. 28, 32; Complainant's Mot. Summ. Dec. 36-38. It argues that the regulations provide no exception for good faith but delayed submissions. Reply Mot. Summ. Decision 13-15.

Respondent objects to Complainant's request for summary decision as to Counts XI and XII, arguing that the audit trails were not produced upon request due to technical errors. Resp. Mot. Summ. Decision 4. It further argues that once DHS advised it of the missing data, it worked to produce the information. Respondent stresses that it established a system to collect I-9 data in good faith, and it argues that it should not be punished for technical errors in a generally compliant and widely used Form I-9 system. *Id.* at 7.

i. Standards of Law – Audit Trails

Complainant alleges in Counts XI and XII that Respondent violated 8 U.S.C. § 1324a(a)(1)(B), which renders non-compliance with § 1324a(b) unlawful. Section 1324a(b) creates three general requirements for Forms I-9. On the first section of the Form I-9, the applicant

²⁰ The Court presumes that the Complainant's arguments on liability relate to Respondent's alleged failure to prepare or present the audit trails along with the Forms I-9 by the regulatory deadline. This comports with the Complainant's arguments in its motion for summary decision, as well as being the main point concerning Counts XI and XII that Respondent engages with in its cross motion and opposition. The Court notes, however, that in the Second Amended Complaint, the motion heading for Count XI is "Failed to Ensure that Employee Properly Completed Section 1 and/or Failed to Properly Complete Section 2 or 3 of the Employment Eligibility Verification Form (Form I-9) (Substantive Paperwork Violations)." Second Amended Compl. at 27.

²¹ In the Second Amended Complaint Complainant refers to the violations constituting Count XI and XII using the same language, and the same citation to the statute, however, in its motion for summary decision Complainant clarifies that Count XII constitutes the employees who were on DHS's Notice of Suspect Documents list and for whom metadata was not timely produced. Count XI are employees who were not on the Notice of Suspect Documents list for whom metadata was not timely produced. Second Amended Complaint at 36.

must attest that they are a citizen or national of the United States, a permanent resident, or otherwise authorized to work (the “Section 1” attestation). 8 U.S.C. § 1324a(b)(2). On the second section of the Form I-9, the employer must attest that they have verified that an applicant is not an “unauthorized alien” by examining work authorization and identification documents (the “Section 2” attestation). 8 U.S.C. § 1324a(b)(1). Third, 8 U.S.C. § 1324a(b)(3) provides that an employer “must retain a paper, microfiche, microfilm, or electronic version of the [Form I-9] and make it available for inspection”

Opting to store Form I-9 data electronically carries with it obligations to maintain the data in a manner that permits one to see when changes were made to the forms, and by whom. *See, e.g.,* 8 C.F.R. § 274a.2(f)(1) (“A person or entity who chooses to complete and/or retain Forms I-9 electronically must maintain and make available to an agency of the United States upon request documentation of the business processes that . . . [e]stablish the authenticity and integrity of the Forms I-9, such as audit trails.”).²²

The timeframe for compliance comes from 8 C.F.R. § 274a.2(b)(2)(ii), which directs that employers must produce Forms I-9 within three business days of the request, and that “[a]ny refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements set forth in section 274A(b)(3) of the Act.”

The data retention obligations come from 8 C.F.R. § 274a.2(f)(1)–(2), which directs that if an employer elects to complete or retain copies of Forms I-9 electronically, they must retain and make available to DHS the process they used to: 1) create the retained Form I-9, 2) modify or maintain the form, and 3) establish the authenticity and integrity of the form. The regulation directs that failure to maintain documentation showing its process for validating the data is a violation of the statute.

8 C.F.R. § 274a.2(e)(8), which directly references an employer’s duty to produce audit trails upon request, bears verbatim inclusion in this order:

At the time of an inspection, the person or entity required to retain completed Forms I-9 must:

(i) Retrieve and reproduce (including printing copies on paper, if requested) only the Forms I-9 electronically retained in the electronic storage system and supporting documentation specifically requested by an agency of the United States, along with

²² On August 22, 2012, Executive Associate Director of Homeland Security Investigations James A. Dinkins issued a Memorandum to Assistant Directors, Deputy Assistant Directors, and Special Agents in Charge at DHS with the subject “Guidance on the Collection and Audit Trail Requirements for Electronically Generated Forms I-9.” James A. Dinkins, Guidance on the Collection and Audit Trail Requirements for Electronically Generated Forms I-9” (Aug. 22, 2012), *available at* https://www.ice.gov/doclib/foia/dro_policy_memos/collect-audit-forms-i9.pdf (Dinkins Memo). This Memorandum includes a flowchart to “illustrate the minimum acceptable standards for electronically generated Forms I-9” to ensure compliance with the electronic Form I-9 regulations. *Id.* at 2. This document is also relevant to the Court’s analysis of employer obligations when creating, retaining, and presenting electronic Forms I-9.

associated audit trails. Generally, an audit trail is a record showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time . . .

(emphasis added).

ii. Analysis

There is no debate that Respondent failed to produce the audit trails for the Forms I-9 referenced in Counts XI and XII within the regulatory timeframe, or by the more lenient timeframes outlined in Complainant's correspondence with Respondent. Respondent asserts that the data was not produced due to a technical error which it ultimately rectified; it produced the audit trails roughly a month and a half late.

An audit trail is an essential component of the electronic Form I-9—it serves to verify the “authenticity and integrity” of the Forms I-9, in particular the Sections 1 and 2 signatures, by verifying who accessed the computer system when these signatures are completed. An untimely-presented audit trail is a violation of 8 C.F.R. §§ 274a.2(b)(2)(ii), (e)(8), (f), and 8 U.S.C. §§ 1324a(a)(1)(B), (b)(3) in the same way as an untimely-presented paper Form I-9.

Further, a party may not avoid liability by tardily producing audit trail data. The regulations make clear that the metadata is effectively inseparable from the electronic Forms I-9, and that without the data advising how the Forms I-9 were created the underlying documents are of little to no utility. *See also United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, 6 (2020) (“The failure to timely present an I-9 is a different matter from the failure to timely complete section 1 and/or section 2 of an I-9” and “the employer cannot avoid liability by submitting I-9 forms at some later point in the process, *absent an extension of time.*”)

Accordingly, the Court finds that Complainant has established liability for failure to timely present for each of the employees in Counts XI and XII, as the complete Forms I-9 with associated audit trails for those employees were not presented until after due date.

Complainant's Motion for Summary Decision is GRANTED for Counts XI and XII.

Given that an employer is only liable for one violation per Form I-9, Respondent will be liable for the Forms I-9 for Employee Reference #: 1, 4, 6, 26, and 41 under Count XI, and will not be liable under Counts II or Count VII. Likewise, a number of employees listed under Count XII are also listed under Counts IV or Count VII.²³ Respondent will be liable for the Forms I-9 for the employees noted in the footnote only under Count XII.

²³ Count XII employee reference #s: 8, 14, 15, 17, 18, 20, 22, 26, 28, 29, 32, 35, 37, 41, 42, 47, 48, 50, 52, 54, 55, 58, 59, 60, 61, 63, 65, 66, 67, 68, 71, 72, 73, 76, 77, 78, 80, 82, 83, 84, 85, 86, 88, and 89.

iii. Good Faith Defense

Respondent has argued that even if it failed to produce the audit trails within the requisite timeframe, the error is harmless because these violations are “technical or procedural,” and that it did not receive the required notice and ten-day time period in which to correct the errors. Complainant counters that the errors are substantive, and that consequently Respondent is due no additional notice or grace period to produce the missing information.

Errors in satisfying the requirements of the employment verification system are known as “paperwork violations,” which are categorized as either substantive or technical and procedural. United States v. Cawoods Produce, Inc., 12 OCAHO no. 1280, 8 (2016) (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm’r of Programs, Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (Mar. 6, 1997) (Virtue Memorandum)).

“Failure to present, failure to prepare, and failure to timely prepare are all substantive violations.” United States v. El Paso Paper Box, 17 OCAHO no. 1451a, 4 (2022); *See also* Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355, at 3–4 (“According to OCAHO case law, the employer cannot avoid liability by submitting I-9 forms at some later point in the process, *absent an extension of time*) (emphasis in original); United States v. Frio Cnty. Partners, Inc., 12 OCAHO no. 1276, 11 (2016) (“Failure to timely prepare a Form I-9 is a substantive violation”) (citation omitted)).

The Court finds that Respondent’s failure to timely present an audit trail for these Forms I-9 is a substantive violation. Like failure to timely present a paper Form I-9, a failure to timely present an audit trail undermines the “basic requirements of the act,” United States v. LFW Dairy Corp., 10 OCAHO no. 1129, 5 (2009), under § 1324a(b)(1)-(3), by preventing an auditor from timely verifying the authenticity and integrity of the attestations in the Form I-9. Instead of constituting a “minor, unintentional violation[] of the verification requirement,” this Court finds that the failure to produce an audit trail verifying the information in the Form I-9 constitutes a “failure[] to comply with the verification requirements as a whole.” LFW Dairy Corp., 10 OCAHO no. 1129, at 4.

Accordingly, the Court does not find that a good faith defense applies to the violations in Counts XI and XII. The Court may nonetheless consider Respondent’s arguments regarding its reliance on its electronic Form I-9 provider, and the inadvertent nature of the failure, when calculating a penalty for these Counts.

VI. BIFURCATION

The decision to bifurcate proceedings is in the Court’s discretion. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355, at 8 (citing Hernandez v. Farley Candy Co., 5 OCAHO no. 781, 464, 465 (1995)). Having addressed liability for these counts in this order, the Court will address the penalty assessment for these and the remaining counts in a future order.

VII. ORDERS

Complainant's Motion for Summary Decision is GRANTED as to Count VIII, Count XI and Count XII. Complainant's Motion for Summary Decision is DENIED as to Count VII, Count IX, and Count X.

Respondent's Motion for Summary Decision is GRANTED as to employees 8, 9, and 11 of Count IX. Respondent's Motion for Summary Decision is DENIED as to Count VII, Count VIII, employees 1-7 and 10 in Count IX, Count X, Count XI, Count XII.

Because the Court finds issues of material fact with Count VII, employees 1-7 and 10 in Count IX, and Count X, those Counts will proceed to a hearing on liability.

SO ORDERED.

Dated and entered on July 11, 2025.

Honorable John A. Henderson
Administrative Law Judge