

**AIMS Property Management Update  
NAA/NMHC Joint Legislative Program**

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1. [Immigration Reform and the Apartment Industry](#)
  - [Federal Enforcement Actions: Hiring Immigrants](#)
  - [Litigation: Renting to Immigrants](#)
  - [Legislative Outlook](#)

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**IMMIGRATION REFORM AND THE APARTMENT INDUSTRY**

With each passing month, the need for comprehensive immigration reform becomes clearer. Current law does not effectively manage the illegal immigration problem, nor does it address our growing need for both highly skilled and entry-level workers. Absent Congressional action on this issue, business owners—including apartment firms—are left to deal with a patchwork of state and local initiatives, an aggressive regulatory enforcement agenda by the Bush Administration and now, for the first time in history, federal litigation targeting housing providers who rent to illegal immigrants.

Beyond the liability risk this piecemeal approach to immigration enforcement raises for apartment firms, failure to fix our broken federal immigration policy limits the industry's ability to access diverse labor and resident pools fueled by immigration. As a result, this issue remains a high-priority lobbying issue for NAA/NMHC.

**Federal Enforcement Actions: Hiring Immigrants**

Most of the government's stepped-up enforcement actions have targeted employers, both large and small, who fail to properly verify an employee's legal status to work in the U.S. The U.S. Department of Homeland Security (DHS) is vigorously enforcing existing employer-focused regulations and has embarked on an ambitious rulemaking effort to put in place additional obligations and harsher penalties for violating current and proposed laws.

The most controversial element of this effort is the DHS regulation popularly known as the "No-Match Rule." No-match letters are sent by the DHS or the Social Security Administration (SSA) when an employee's Social Security number does not match information in the government's database. Traditionally, these letters have been informational only, but the DHS regulations would use them for enforcement purposes. Under the rule, receipt of a no-match letter could be used as evidence that the employer knowingly hired or continued to employ a worker without proper work authorization. The rule was set to go into effect on September 14, 2007, but was blocked by a federal judge. DHS issued a purportedly reworked rule that is virtually identical to the original. It remains to be seen whether the new version will pass the court's review.

Undaunted, the Administration continues to seek new enforcement avenues. The latest was a June 12 proposal (73 FR 33374) that, if approved, would require federal contractors and their subcontractors to participate in the E-Verify program. NAA/NMHC are analyzing how this could affect member firms, particularly those that contract with the federal government to provide military housing. The proposed rule is available at <http://tinyurl.com/3zatp7>.

**Litigation: Renting to Immigrants**

In addition to the employment compliance issues that immigration enforcement raises, apartment firms are increasingly being

targeted for their role in housing illegal immigrants. Beginning with gusto in 2005, Congress's failure to approve a legislative solution inspired cities and towns across the country to enact their own immigration-related restrictions that, among other things, prohibited apartment owners from renting to illegal immigrants. Fortunately, these local ordinances have largely been withdrawn or blocked.

Now, in an unprecedented move, the federal government has initiated what is believed to be the first ever lawsuit prosecuting a multifamily firm for renting to illegal immigrants. The lawsuit against two Kentucky apartment owners alleged that they violated the Immigration Reform and Control Act's (IRCA) anti-harboring provisions (*United States v. JH 2 Investments, LLC d/b/a Hadden Associates*, No. Lexington 08CR50, (E.D. Ky. decided June 27, 2008).

IRCA criminalized knowingly harboring, concealing and shielding from detection an illegal immigrant, but it did not, nor did the regulations implementing it, define what specific acts constitute harboring. Some have argued that if an apartment owner *knowingly* rents to someone that is in the country illegally, they are culpable. Notably, at least one federal court has said that harboring can mean housing illegal immigrants with the intent to conceal them from police. Traditionally, however, the law has mainly been interpreted by courts to cover human trafficking.

The federal lawsuit involved two Lexington-area properties that catered to Hispanic residents. The indictment against them alleged that they failed to check residents' immigration status and encouraged the residents to stay in the U.S. illegally. The owner testified in court that as a cost-saving measure he had stopped running credit checks on prospective residents and instead required only proof of employment. He further testified that he did not question applicants about their immigration status for fear of violating fair housing laws.

Thankfully, the federal government's attempt failed last month when a jury cleared the owner on June 29. It is unclear, however, whether the approach will be ultimately successful under a different set of facts. NAA/NMHC believe it would be illogical for the government to commence a campaign against apartment owners renting to undocumented individuals. No federal statute, including the IRCA, requires an apartment firm to check an applicant's immigration status. Even if obligated, owners are not equipped to do so since identification documents are unreliable and there is not currently available a definitive means to verify such information. The federal government's E-Verify database (see below) is incomplete, prone to error and is intended only to allow an *employer* to run work authorization checks.

In separate action, on June 3, the Immigration Reform Law Institute (IRLI), a well-known anti-immigration group based in Washington, DC, filed a federal lawsuit in New Jersey against an apartment firm for allegedly violating the Racketeer Influenced and Corrupt Organizations Act (RICO), the Fair Housing Act and various New Jersey state laws (*Delrio-Mocci v. Connolly Properties Inc.*, No. 2:2008cv02753, (D. N.J. filed June 2, 2008)). All of the claims against the firm involve accusations that they conspired to rent apartments to undocumented immigrants. IRLI's complaint charges that the company "devised a scheme" that identified low-income immigrants and steered them, by immigration status, race and source of income, to decaying properties when it was unable to lease apartments to legal residents.

The complaint further alleges that the company required different forms of identification for legal and illegal applicants, only required legal residents to undergo a background check, and did not impose occupancy limits on apartment units rented by illegal immigrants. The group says that there are so many illegal immigrants involved that the company's actions amount to harboring and that rental payments from those residents was money laundering under RICO. A novel legal approach, the complaint urges that RICO should be interpreted broadly to include rental housing providers who conspire to lease to illegal immigrants. The apartment company's response brief is due to the court in September.

NAA/NMHC will follow these developments closely and will continue to argue that laws that make apartment owners de facto

immigration police are operationally unworkable, and arguably violate the Constitution and the Fair Housing Act.

## **Legislative Outlook**

Despite robust advocacy by lawmakers of both parties, cross-industry coalitions and a range of interest groups urging comprehensive reform, Congress has not truly focused on the issue since last year, and it may be quite some time before it tackles it again. Last June, after weeks of debate, a privately crafted compromise negotiated by 12 Senators failed to secure enough votes to end a filibuster. The Senate's failure to pass a bill meant the House didn't consider one, either.

Meanwhile, numerous piecemeal proposals have been introduced in both the House and Senate that, if approved, would address just one aspect of immigration policy. Employment verification has seen by far the greatest action among the four prongs of comprehensive reform, which also include improved border protection, a guestworker program and a rational approach to documenting the millions of undocumented individuals currently living and working in the U.S. The prospect of Congress approving a measure that would reform current employment verification laws seems unlikely this year. As it is, Congress is struggling to even pass a bill to extend the E-Verify program, which will expire November 1 if Congress does not reauthorize it. (E-Verify is an Internet-based system that allows employers to compare an employee's information against SSA and DHS databases. Participation in the system for private employers is voluntarily, although at least one state has made it mandatory.)

One obstacle is the considerable disagreement in the House about whether E-Verify should be reauthorized or eliminated in favor of a more reliable system. One measure (H.R. 5596) would simply extend E-Verify for 10 more years. A separate bill, the New Employee Verification Act (NEVA, H.R. 5515), would eliminate the flawed E-Verify program and replace it with a mandatory system. Among other things, NEVA would allow employers to electronically submit an employee's identification information into state-level databases used for child support enforcement. It would also allow employers to choose to participate in a new system that would make use of biometric identification and would incorporate a background check on employees. NEVA would allow employers to participate in both programs.

NAA/NMHC will continue to push for comprehensive immigration reform, arguing that addressing any one element independently of the others would be inconsequential. We support the concept of a federal employment verification system, but it should not be made mandatory unless it is accurate, efficient and affordable. In addition, employers must be protected from criminal and civil liability for relying on federal data that contains errors.

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