

ICE Worksite enforcement and employer sanctions

The new engine that drives U.S. immigration policy

The 112th Congress convened on Jan. 5, 2011, with 97 new members of the House of Representatives and 16 new senators. Chairman Lamar Smith (R-Texas) of the House Judiciary Committee, and new chairman of the Immigration Policy and Enforcement Subcommittee Rep. Elton Gallegly (R-Calif.), are renowned for their strong enforcement stance and for their unequivocal support for greater scrutiny of employers and the E-Verify program (the electronic employment eligibility verification tool that the Department of Homeland Security administers). In fact, in the first two months of his chairmanship, Rep. Gallegly has already introduced two bills to expand E-Verify and held two hearings on worksite enforcement. The first was entitled “ICE Worksite Enforcement – Up to the Job?” The second was called “E-Verify – Preserving Jobs for Americans.” Most observers anticipate further legislation to impose greater obligations and stricter penalties against employers.

Administratively, the focus of interior immigration enforcement has moved from strictly counterterrorism in the immediate aftermath of Sept. 11, 2001, to frequent raids against illegal laborers later in the Bush administration. Under President Obama and Secretary of Homeland Security Janet Napolitano, immigration officials have shifted their focus from deporting unauthorized employees to auditing employers, often resulting in criminal charges against employers and management for engaging in a pattern or practice of knowingly hiring or continuing to hire unauthorized workers or harboring undocumented workers. The mere “reckless disregard” standard for a knowing hire charge makes this particularly appealing for a prosecutor. For example, the government has inferred knowledge from the absence of I-9s for a disproportionate percentage of unauthorized workers or from an employer’s failure to respond to government inquiries from

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the SSA regarding workers who turn out to be unauthorized.

Under Secretary Napolitano, Immigration and Customs Enforcement (“ICE”) has audited over 3,200 employers, debarred 225 companies and individuals from federal contracts and imposed about \$50 million in financial sanctions – more than the total amount of audits and debarments than during the entire Bush administration.

These auditors do not simply look at employers who engage in a pattern or practice of employing unauthorized workers. Employers who do not have any unauthorized workers on their payroll but who maintain poor I-9 records still face potentially large civil fines.

The conundrum employers face is that while immigration enforcement has been stepped up, the Department of Justice’s Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) also has been more aggressive in its enforcement of the antidiscrimination provisions of the Immigration and Nationality Act. These provisions, which also carry civil fines, tag employers who are too zealous in verifying applicants’ eligibility to work. Employers have to walk a narrow and sometimes precarious “middle road” between enforcement and antidiscrimination interests.

To adapt to the new age of enforcement, employers may want to consider the following:

- Ensure immigration is part of all employee handbooks; explaining the criminal exposure that could result from knowingly hiring unauthorized workers and the potential civil penalties that could result if engaging in discrimination;
- Centralize hiring;

- Establish clear accountability for hiring and maintaining I-9s to avoid needless penalties resulting from unintended paperwork errors that could have been avoided;
- Track expiring work authorization after initial hire and verification;
- Hire experienced immigration counsel to conduct an internal audit of all the I-9 forms before ICE knocks on your door;
- Treat all workers the same regardless of national origin or citizenship status;
- Unless a red flag presents itself that would indicate “reckless disregard” or a “knowing closing of the eyes” of an alien’s legal status, such as a clearly fake document or other evidence that the person is not authorized to work, do not demand more or different documents from any employee so long as the employee presents documents enumerated on the back of the I-9 form;
- Institute standard protocols and procedures to follow when receiving government inquiries relating to employees, such as tax, SSA, bank, garnishment or other inquiries that include SSNs to ensure (a) accurate and timely responses and (b) corrective actions such as terminations can go into effect if research for inquiry reveals the presence of an unauthorized worker, and
- Do not ignore red flags when they come up. Doing so could result in criminal charges later.

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