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Bulletins

Illegal Immigration Worksite Enforcement: How to Safeguard Your Company in an Era of Unprecedented Raids and Regulations

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As most employers know, it has been illegal since the enactment of the Immigration Reform and Control Act (“IRCA”) in 1986 for U.S. employers to employ individuals who are not authorized to work in the United States and to fail to verify the employment eligibility of every new worker using a Form I-9. For many years, there was virtually no criminal enforcement aimed at employers. What little enforcement existed was accomplished administratively, through I-9 inspections and the issuance of fines. Even then, fines were generally limited in size and open to negotiation. Since its establishment in 2003 in the wake of 9/11, however, U.S. Immigration and Customs Enforcement (“ICE”) has employed more-aggressive methods of punishing violators, relying heavily on worksite raids that result in criminal charges, asset seizures, administrative arrests, and deportations.

To make the point, for example, on May 22, 2007, agents with ICE and the Social Security Administration (“SSA”) raided a poultry plant in Butterfield, Missouri, arresting 100 suspected illegal immigrants. Likewise, in March 2007, ICE raided Michael Bianco, Inc., a military goods factory that was a party to government contracts. Three hundred sixty immigrants were taken into custody. Months after the raid, the president of the company agreed to pay a fine and serve up to 18 months in prison, pleading guilty to several charges, including hiring illegal aliens, helping to shield them from detection, failing to pay overtime, and fraudulently misleading the government. The company was fined \$1.5 million.

In perhaps the most publicized worksite enforcement effort thus far, on May 12, 2008, ICE and other government agents raided Agriprocessors, Inc., the country’s largest kosher meat processing plant and one of northern Iowa’s largest employers. The government arrested 398 workers, most with fake documents. The founder, Brooklyn-based Chabad Lubavitch Rabbi Aaron Rubashkin, and his son have been charged criminally along with two human resources managers. In addition, the Iowa Division of Labor Services ordered the company to pay over \$250,000 in back wages and proposed fines of almost \$10 million against the company for violation of state wage and hour laws. Agriprocessors, Inc. filed for bankruptcy on November 5, 2008. In an interview with the online publication Portfolio.com, the elder Rabbi Rubashkin said, “it’s a *shanda*, a shame . . . what happened in Postville.” ^[1]

Recent Enforcement: Highwater Mark or Just The Beginning?

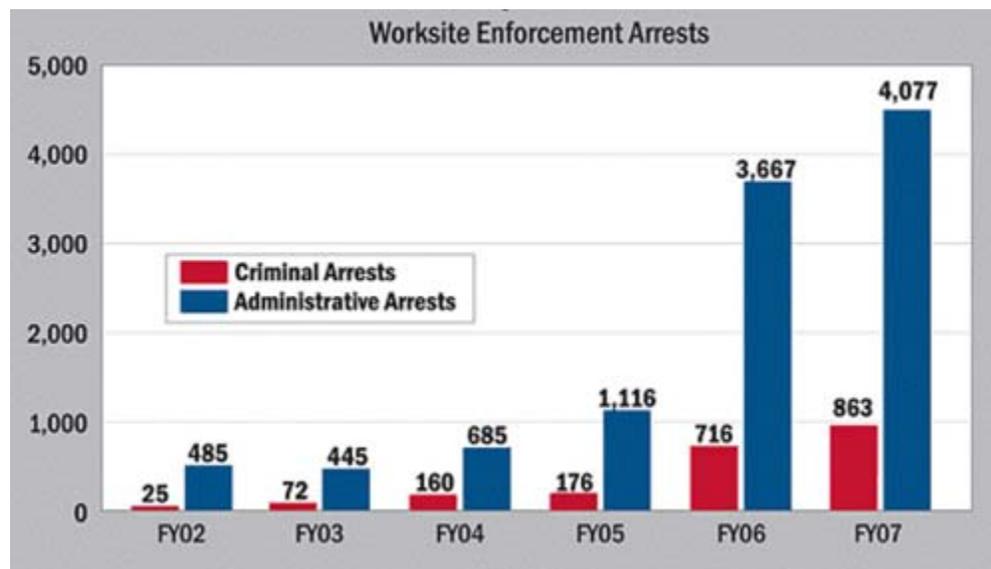
In 2008, ICE’s worksite enforcement raids resulted in 5,713 administrative and 1,101 criminal arrests. One hundred thirty five of the criminal charges were filed against employers and individuals in the supervisory chain or human resources. The agency obtained over \$30 million in fines, restitution and civil judgments from the worksite enforcement efforts in the past year.

ICE maintains that employers are never targeted for raids randomly, and that all investigations are based on actual intelligence. ICE asserts that its primary focus is on employers who are “egregiously violating immigration laws, especially when those violations can affect our nation’s security.”^[2] Nevertheless, this heightened enforcement has ramifications for all employers. While most employers do not knowingly flout the

law, critics note that ICE's intelligence sources can be very unreliable, as "tips" can come from disgruntled employees, bystanders with racial biases, and competing companies. Moreover, no industry is safe from investigation, although agriculture, food processing, landscaping, and temporary services employers have been the principal targets thus far. Indeed, in a delicious irony, as this article goes to press, news media nationwide are reporting that workers who cleaned the home of none other than the nation's top immigration official, Secretary of the Department of Homeland Security Michael Chertoff, were illegal immigrants. DHS immediately pointed the finger at the company that employed the workers, alleging that it did not do proper background checks of the workers and threatening fines of more than \$22,000. The owner, however, noted that before he took any workers into the Chertoffs' home, he had to provide the Secret Service with the employees' passports or visas, work permits, and Social Security cards, and the Secret Service also failed to detect the undocumented workers. Mr. Chertoff is not the only immigration official caught with illegal workers at home: The Boston, Massachusetts-Area Port Director for U.S. Customs and Border Protection — the agency charged with keeping illegal aliens out of the country — was arrested last week for encouraging her cleaning lady, an illegal alien from Brazil, to stay in the country. She faces up to 10 years in prison and \$250,000 in fines if convicted.

Hand in hand with the increased raids, the government is using its regulatory powers to make it more difficult for employers to rely solely on eyeballing an employee's documents to establish employment eligibility. The government is slowly but surely forcing employers to police their own workforces by requiring reference to the government's own databases—reliable or not.

Below we discuss these regulatory changes. We also provide advice on how to respond if targeted for an I-9 audit or a raid. Finally, we look forward, discussing what changes we might expect after Barack Obama takes the helm.



Government Databases: Tools or Traps?

DHS's "Safe Harbor" Regulation & Social Security "No-Match" Letters

On August 15, 2007, the Department of Homeland Security ("DHS") issued its final rule related to Social Security no-match letters, called "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." The regulation expands the circumstances in which DHS can infer that an employer has constructive knowledge of an IRCA violation.

No-match letters are nothing new. For years, SSA has issued letters indicating that certain employees' names and corresponding Social Security numbers provided on Forms W-2 do not match SSA's records. In the past, though, SSA issued these letters merely to inform the employer and employee that the employee's benefits could not be properly allocated because of the incongruity. The DHS regulation, however, provides that an employer may be deemed to have constructive knowledge of the fact that a worker is unauthorized to work in the United States if the employer does not follow specific steps to verify the employee's status upon receipt of such a letter. If the employer follows all the steps, it may benefit from a "safe harbor" from prosecution. The last step in the process required to be eligible for the safe harbor is to terminate any employee who cannot resolve the discrepancy in roughly 90 days. (The specific steps that an employer must take to reach a "safe harbor" under the regulation are detailed in our Employment Law Commentary, [Social Security No-Match Letters](#).)

Mass Firings or No Big Deal? (Homeland Security's New Regulation Enjoyed for Now).

Shortly after the rule's promulgation, a number of labor groups filed a complaint in the Northern District of California to challenge its validity. The court granted a preliminary injunction, preventing enforcement of the regulation until the matter was fully litigated. The court identified three problems with the regulation: (1) DHS had failed to supply a "reasoned analysis" to justify the change in how the agency treated no-match letters; (2) DHS had exceeded its authority by interpreting; and providing an exception to; the anti-discrimination provisions of IRCA; and (3) DHS had not conducted an analysis of the rule's impact on businesses, as required by the Regulatory Flexibility Act.

DHS responded by issuing a Supplemental Rule on October 23, 2008, which purports to solve the problems that the court found. In turn, on November 6, 2008, DHS moved to vacate the preliminary injunction and moved for summary judgment. The court will likely not decide the motions until February or March 2009. By then, under the Obama Administration, the government may modify its position on the regulation.

E-Verify

Distinct from no-match letters, but directly tied to the push to increase enforcement of workplace immigration law, the government recently expanded the reach of its E-Verify system, formerly known as Basic Pilot. E-Verify is a free, Internet-based system operated by DHS in cooperation with SSA and United States Citizenship and Immigration Services ("USCIS"). The program enables employers to determine electronically whether newly hired employees are eligible to work, by checking the information provided on the employees' I-9 against records contained in DHS and SSA databases. If the information matches, E-Verify sends a confirmation to the employer mere seconds after the initial query. If the information does not match, E-Verify issues a "Tentative Non-confirmation" ("TNC"). Those employees who receive a TNC are provided a chance to work with the SSA or USCIS to confirm their employment eligibility.

At its inception in 1997, Basic Pilot/E-Verify was offered as an entirely voluntary program. However, starting on January 15, 2009, federal contractors and subcontractors across the United States will be required to begin using E-Verify to determine the employment eligibility of their employees. [3] (For a closer look at exactly how this rule will affect your company, please refer to our e-alert [*Final E-Verify Rules for Government Contractors Issued*](#), by Janie Schulman.)

Other employers still have the ability to enroll voluntarily in the E-Verify system. One benefit of participation is that employers may quickly verify whether their employees are eligible to work in the United States. As an additional benefit, DHS has stated that it will "exercise its prosecutorial discretion favorably for employers who use such programs."

Positive aspects aside, critics argue that the system is critically flawed and should not be used by employers voluntarily. They contend: (1) the E-Verify databases are inaccurate, resulting in incorrect employment eligibility determinations (see the discussion about Secretary Chertoff and the Secret Service background checks, above); (2) workers' privacy might be compromised because the databases do not meet government and industry standards for information protection; and (3) while it is a "free" program, a number of employers have found participation to be "extremely costly" and "disruptive." Some argue that wide-ranging implementation of E-Verify will result in an overwhelming DHS and SSA backlog. Even more disconcerting, there is a fear among labor rights groups that expanded use of E-Verify will result in substantial employer abuse, for example, the use of an E-Verify Temporary Non-Confirmation as a pretext for refusing to employ individuals, in a discriminatory manner. [4]

The most compelling reason why an employer should think twice before electing to participate in E-Verify is the fact that, to participate, employers must sign the "E-Verify Memorandum of Understanding." Seemingly innocuous in its title, the memorandum functions as a binding contract between employers and the government, under which employers must agree to: (1) "become familiar with and comply with the E-Verify Manual"; (2) "initiate E-Verify verification procedures within 3 Employer business days after each employee has been hired"; and (3) "**allow the Department of Homeland Security and SSA, or their authorized agents or designees, to make periodic visits to the Employer.**" In short, an employer that chooses to participate in the E-Verify program must open itself to greater governmental scrutiny and oversight than mandated by law.

E-Verify on the State Level

While immigration has traditionally been an issue of federal law, some states have decided to take matters into their own hands. A number of states (including Arizona, Mississippi, Colorado, [5] Georgia, Minnesota, Oklahoma, North Carolina, Rhode Island, South Carolina, and Utah) have taken steps to make E-Verify mandatory for certain types of employers. Arizona and Mississippi have gone so far as to require all employers in those states to use E-Verify.

Some states, by contrast, have moved in the opposite direction. Illinois, for one, has passed a law that bars employers from using E-Verify at all. And on June 4, 2008, a federal judge in Oklahoma granted a preliminary injunction of Oklahoma's mandatory E-Verify law on the grounds that it was likely preempted by federal immigration law.

Advice to Employers

Given the current state of the law, the ongoing challenges to E-Verify's validity, and the differing state approaches to E-Verify, any employer would be confused as to its legal obligations. Such confusion is measurably augmented when faced with the potential of I-9 audits or, worse yet, raids by ICE agents.

Should You Participate in E-Verify?

The advantages and disadvantages of participating in E-Verify have been noted above. And, in fact, the decision to participate may already have been made for you, depending upon the state in which your business is located or your federal contractor status. In light of the transition of governmental power that will be occurring over the next few months, it may be worth waiting to see how the new Administration chooses to deal with both the issue of E-Verify and the issue of unauthorized workers in general.

How to Handle an I-9 Audit

To avoid a stress-filled, last-minute scramble to prepare your company for an audit, make sure to have a policy already in place for how your company will handle a visit from ICE agents. In part, this entails designating a point person that will serve as the primary employer-ICE liaison. A place for the review of I-9s should also be established beforehand, preferably a location that is separate and closed off from the rest of the work force. And of primary importance, make sure that ICE has provided adequate notice of its intent to audit your company. By law, if ICE does not have a warrant to enter the premises and search for documents, then it must provide an employer with three days' notice prior to an inspection. However, ICE may conduct an inspection without notice if the employer consents. Under no circumstances should consent to a waiver of the three-day notice requirement be given. This three-day window is critical to ensuring that your documentation and practices are in compliance with federal law and will give you the opportunity to consult with legal counsel and prepare for the audit.

How to Handle an ICE Raid

When an ICE raid occurs, your first action must be to call your attorney and seek advice, if possible. Again, a point person should take control of the situation immediately and confirm the identity of the primary ICE agent and determine the scope of the agency's search. The scope should be ascertainable from an inspection of the warrant, the required document for an ICE raid. In examining the warrant, ensure that it has been signed by the court and is being executed within the permissible timeframe, and that only documents within the scope of the warrant are seized or examined.

Once the legitimacy of ICE's presence is established, you should then make arrangements to copy responsive computer files on hard drives for ICE agents—rather than simply turning over your computers—so that it is possible for business activity to continue after the raid without disruption. It is appropriate to assign representatives to accompany each individual ICE agent in his/her inspection of the business premises. As in the case of an I-9 audit, it should be made clear to the employees that they are not required to speak with ICE agents.

If employees are detained or arrested by ICE agents under suspicion of illegal alienage, whether your company should provide legal representation to the employees should be made on a case-by-case basis. At no time during the raid should you or any of the company's representatives attempt to conceal information or obstruct ICE agents in their investigation. Provided that they have a warrant, interference with their investigation is a violation of the law.

Although a disruptive and unsettling event, an ICE raid, if dealt with properly, should not prevent your company from returning to business as usual within a matter of days. To achieve this goal, it is critically necessary to have a plan in place and communicate with your attorney effectively throughout the process.

The Obama Administration: Will There Be Change?

Within a week of his election, President-elect Obama received calls from advocacy groups and from House Speaker Nancy Pelosi to impose an immediate moratorium on worksite enforcement raids as soon as he takes office. With immigrant voters gaining political clout, it is likely that the new Administration will make immigration issues a high priority, as promised.

The Obama-Biden Plan for immigration reform provides for meeting employer demand for workers by raising the cap on the number of legal immigrants, creating a path to citizenship for illegal immigrants in otherwise good standing, and decreasing incentives to enter illegally “by cracking down on employers who hire undocumented immigrants.” [6] Specifically, leaders expect Obama to raise the cap on the number of highly skilled worker H-1B visas.

By his own account, Obama will focus more on deterring and punishing employers of illegal immigrants than he will on arresting and deporting the illegal immigrants themselves. His selection of Arizona Governor Janet Napolitano as Secretary of Homeland Security is telling, especially in light of Arizona’s hard-fought battle to uphold its law mandating the use of E-Verify by all employers in the state. Moreover, in a National Public Radio debate on December 4, 2007, President-elect Obama said “if they are illegal, then they should not be able to work in this country. That is part of the principle of comprehensive reform, which we’re going to crack down on employers who are hiring them and taking advantage of them. But I also want to give them a pathway, so that they can earn citizenship, earn a legal status, start learning English, pay a significant fine, and go to the back of the line.” [7]

Conclusion

Government agencies have been making a concerted push to enforce IRCA. The effect of this push is seen in raids which have been highly publicized, no doubt for their *in terrorem* effect. The push is also clear in the federal government’s attempt to bootstrap SSA no-match letters into immigration enforcement tools.

While programs exist to facilitate worker authorization verification, like E-Verify, there are both pros and cons to participating. Many groups anticipate/hope that the Obama Administration will continue to focus on IRCA enforcement by holding employers accountable, rather than the workers themselves. For these reasons, it is critically important that you and your company remain aware of the dynamic state of immigration law, with an eye to the horizon and on a President-elect who based his campaign on the concept of “Change.”

As the old adage goes, the best way to get out of a sticky situation is not to get into one in the first place. Knowledge and preparation are key to successfully protecting your company from the specter of I-9 audits and ICE raids. To that end, Morrison & Foerster attorneys are ready and willing to assist you in your efforts to navigate the uneven legal terrain that presently characterizes this nation’s approach to illegal immigration worksite enforcement.

Footnotes

[1] A Beef With the Rabbis, Conde Nast Portfolio.com (November 2008).

[2] U.S. Immigration and Customs Enforcement, [Frequently Asked Questions About Worksite Enforcement](#), August 12, 2008.

[3] U.S. Citizenship and Immigration Services, [USCIS Update: Federal Contractors Required to Use E-Verify System](#), November 13, 2008.

[4] National Immigration Law Center, [Not Ready for Prime Time and Not a Magic Bullet: New Executive Order and Proposed Rules Require Federal Contractors to Use Basic Pilot/E-Verify](#), July 2008.

[5] For a detailed look at Colorado’s use of E-Verify, please refer to our Employment Law Commentary by Steven Kaufmann and Stephanie Forbes: [Colorado’s New Employment Verification Laws](#) – Vol. 18, No. 12, December 2006.

[6] [The Office of the President-elect, Agenda: Immigration, The Obama-Biden Plan](#) (December 2, 2008).

[7] [NPR Radio, 2007 National Public Radio Presidential Debate for the Democratic candidates](#) (December 4, 2007).