

[Alerts and Updates]

Department of Homeland Security Announces Shift in Focus to Criminal Prosecution of Employers That Hire Undocumented Workers

May 5, 2009

The U.S. Department of Homeland Security (DHS) on April 30 issued a new [Fact Sheet](#) on its Worksite Enforcement Strategy, announcing a shift in focus by U.S. Immigration and Customs Enforcement (ICE) to target the employers of undocumented workers, rather than the workers themselves. "Effective immediately, ICE will focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration."¹

This announcement by DHS was not unexpected. Secretary of Homeland Security Janet Napolitano has repeatedly pledged that, under the Obama administration, her agency will aggressively prosecute employers that violate the law by hiring aliens who are not authorized to work in the United States. Along with a renewed focus on criminal aliens, ICE has been instructed to target "employers who cultivate illegal workplaces" for civil fines, debarment and criminal prosecution in federal court. In addition, undocumented workers discovered in the course of worksite enforcement actions will continue to be arrested and processed for deportation.

In a marked shift from enforcement practices under the Bush administration, ICE officers will be held to "high investigative standards" under which they are instructed to "look for evidence of the mistreatment of workers" as well as evidence of trafficking, smuggling, harboring, visa fraud, identification-document fraud, money laundering or other criminal conduct by employers. ICE will also be expected to obtain indictments, search warrants or cooperation from a local U.S. Attorney's Office to target the employer of "illegal workplaces" before raiding a worksite and arresting undocumented employees. DHS announced further that "existing humanitarian guidelines" will apply to enforcement actions involving 25 or more undocumented workers, as opposed to the previous threshold of 150 workers. Finally, the Fact Sheet reiterates the agency's commitment to "employee verification tools," such as E-Verify, which "improve the accuracy" of eligibility determinations and "combat illegal employment."

Employers may want to ensure that they are in compliance with all workplace laws, including proper verification of new hires, reverification of existing employees and maintaining accurate, updated Forms I-9. Employers should be careful not to overreact to DHS's announcement, because erroneously firing an employee who is authorized to work may result in a discrimination lawsuit. An employer that is concerned about the immigration status of a particular employee may want to consult the company's attorney before taking any employment action against the individual.

H-1B Cap Update

On April 27, 2009, U.S. Citizenship and Immigration Services (USCIS) provided an update regarding the number of filings for H-1B petitions for the fiscal year 2010 program. As of that date, USCIS had received approximately 45,000 H-1B petitions counting toward the congressionally-mandated 65,000 cap. The agency continues to accept petitions subject to the general cap.

Additionally, the agency has received approximately 20,000 petitions for aliens with advanced degrees ("master's cap cases"). The first 20,000 of these types of petitions are exempt from any fiscal-year cap on available H-1B visas. When USCIS has determined that it has received 20,000 master's cap cases, any further petitions received will be placed in the general H-1B cap pool.

For cases filed for premium processing during the initial five-day filing window, which began on April 1, 2009, the 15-day premium processing period began April 7. For cases filed for premium processing after the filing window, the premium-processing period begins on the date USCIS takes physical possession of the petition.

For more information regarding the H-1B cap, please see our [March 16, 2009 Alert](#).

About Duane Morris

The attorneys in our Employment & Immigration Practice Group assist clients with the issues presented above, including conducting internal audits of companies' files, reviewing I-9s for compliance, explaining E-Verify and the as-yet-unimplemented federal contractor E-Verify requirement, discussing how to anticipate and handle a worksite raid and taking steps to avoid conduct that may expose a company to criminal prosecution.

For Further Information

If you have any questions regarding this Alert or would like more information, please contact any [member](#) of the [Employment & Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. Fact Sheet on Worksite Enforcement Strategy, U.S. Dep't of Homeland Security (Apr. 30, 2009), <http://www.aila.org/content/default.aspx?docid=28757>.