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Client Alert Commentary

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California Seeks to Restrict ICE Workplace Raids

Employers should take practical steps to comply with a new bill requiring them to demand search warrants from ICE agents.

Key Points:

- Employers need to train facility heads to respond to ICE Agents seeking access to the workplace or employee records.
- Cooperation with ICE must be limited to complying with court-issued warrants, subpoenas and Federal mandates.

On October 5, 2017, California Governor Jerry Brown signed Assembly Bill 450 (AB 450), which imposes several important restrictions on California employers' interactions with Immigration and Customs Enforcement (ICE) agents, as well as significant penalties for violating the law. This *Client Alert* highlights a few key provisions of the bill and offers recommendations for employers' proper compliance.

Key Provision 1: ICE Must Provide Warrants or Subpoenas to Search Workplaces and Access Employee Records

Under the new law, when an immigration enforcement agent seeks entry to nonpublic areas of the workplace, the employer may not consent to a search, and may only allow entry when the agent provides a judicial warrant.[1] Similarly, employers cannot voluntarily allow immigration enforcement agents to access, review, or obtain their employee records without a subpoena or judicial warrant.[2] However, employers can, and should, continue to provide I-9 Employment Eligibility Verification documentation in response to a Notice of Inspection.[3]

Violations of the law can result in civil penalties ranging from US$2,000 to US$5,000 for a first violation and US$5,000 to US$10,000 for each subsequent violation if a court finds that an employer voluntarily consented to the entry by an immigration enforcement agent.[4]

The law is enforced exclusively through a civil action brought by the Labor Commissioner or the Attorney General. As written, no private right of action exists, and the Labor Commissioner recovers any resulting penalties.[5]

Key Provision 2: Employers Must Notify All Current Employees of Records Inspections

Under AB 450, employers must notify all current employees when an immigration agency notifies the employer that it will conduct records inspections by posting notice of any inspection of I-9 Employment Eligibility Verification forms or other employment records within 72 hours of the employer's receipt of notice of the inspection. Employers must also notify the employee's authorized representatives. The notice must:

- Be delivered in the language the employer normally uses to communicate employment-related information to the employee
- Include the name of the immigration agency conducting the inspection
- State the date that the employer received notice of the inspection
- State the nature of the inspection to the extent known [6]

Moreover, upon reasonable request, the employer must provide a copy of the notice of inspection to an affected employee.[7]

In addition to posting notice of inspections, employers must provide the affected employee and his/her authorized representative with: (1) a copy of the written immigration agency notice that provides the results of the inspection; and (2) written notice of the obligations of both the employer and the affected employee arising from the results of the inspection within 72 hours of the employer's receipt of the notice.[8] This written notice must be an individual notice delivered by hand if possible, or if hand delivery is not possible, by mail or email. The notice must include:

- A description of any and all deficiencies or other items identified in the written immigration inspection results related to the affected employee
- The time period for correcting any potential deficiencies
- The time and date of any meeting with the employer to correct any identified deficiencies
- Notice that the employee has a right to representation during any meeting scheduled with the employer[9]

Failure to provide notice as required under the law can result in civil penalties from US$2,000 to US$5,000 for a first violation and US$5,000 to US$10,000 for each subsequent violation, unless the employer is acting at the federal government's specific direction or request in not providing notice.[10] The Labor Commissioner is responsible for recovering the penalty.[11]

Key Provision 3: Employers Will Face Penalties for Unauthorized Reverifications of Work Eligibility

In addition to remedies available to employees under the Immigration Reform and Control Act, employers who reverify employment eligibility of employees in a manner not required by 8 U.S.C. Section 1324(a)(B) may be fined of up to US$10,000.[12] The Labor Commissioner also recovers this fine.

Practical Steps for Employers

Employers should consider taking specific precautions in order to properly comply with AB 450's new provisions and to avoid incurring penalties, including:

- Training employees who are in charge of workplace facility access to always demand a judicial warrant before allowing immigration enforcement agents to enter the workplace, other than the reception or other public areas
- Only providing employee records (or access to records) to an immigration enforcement agent if presented with a subpoena or judicial warrant for those records
- Contacting counsel immediately if an immigration enforcement agent enters the workplace and the employer has any doubt about the correct procedures
- Preparing a template to use for notifying employees of records inspections, and/or downloading the Labor Commissioner's template once it becomes available
- Preparing a template to use when notifying an employee of the result of inspections that affect the employee
- Ensuring that any reverification of employment eligibility strictly complies with applicable federal laws

Implications for Government Contractors

The law applies to all California employers, both private and public, "except as otherwise required by federal law." Accordingly, employers, including California employers with government contracts, can, and should, continue to abide by any immigration or nationality-related requirements of federal government contractor regulations.

Conclusion

AB 450 provides a significant new hurdle to immigration enforcement action in California workplaces. The bill could also serve as a model to other states amid an increased national focus on immigration compliance. Latham will continue to monitor key developments in this fast-evolving area of employment law, which has implications for all businesses across jurisdictions.

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Endnotes

[1] Cal. Gov't Code § 7285.1(a).

[2] *Id.* § 7285.2(a)(1).

[3] *Id.* § 7285.2(a)(2).

[4] *Id.* §§ 7285.1(c), 7285.2(c).

[5] *Id.* §§ 7285.1(d), 7285.2(d).

[6] The Labor Commissioner is required to develop a template notice on or before July 1, 2018 and make the template available on the Labor Commissioner's website. *See* Cal. Labor Code § 90.2(a)(2) (setting forth the contents of the notice required under AB 450).

[7] *Id.* § 90.2(a)(3).

[8] *Id.* § 90.2(b)(1).

[9] *Id.*

[10] *Id.* § 90.2(c).

[11] *Id.*

[12] *Id.* § 1019.2.