INSIDE THE MINDS

New Developments in Immigration Enforcement and Compliance

Leading Lawyers on Navigating Trends in Immigration Law

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New Compliance Concerns for Employers of Foreign Workers

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Introduction

This chapter discusses the current immigration enforcement climate for US employers, which involves a shift away from worksite raids and toward more I-9 audits. Companies can and should adopt "best practices" in the immigration area long before they are faced with responding to an ICE audit. Issues such as internal I-9 audits, joining E-Verify, and responding to an ICE audit are all discussed in this chapter.

Trends and Legal Issues in Immigration Enforcement

Until the last few years, the area of immigration enforcement in the workplace was largely occupied by the federal government and its enforcement of the Immigration Reform and Control Act of 1986 (IRCA). However, many states have recently become active in the immigration area both by passing state laws that attempt to regulate immigration issues and in enforcing those laws. For example, in Arizona, the state legislature passed the Legal Arizona Workers Act (LAWA), A.R.S. 23-211- 214, in 2007 with an effective date of January 1, 2008. LAWA was intended to ensure that no business in Arizona knowingly or intentionally hired or employed undocumented workers. Violation of the law carries with it the potential penalty of a violating company losing its state and local business licenses. LAWA also required all Arizona employees to begin using E-Verify as of January 1, 2008. To date, only four cases have resulted in authorities prosecuting an Arizona employer pursuant to LAWA, with only one business being shut down for two days. These activities are most likely to continue given current political sensitivities and the fact that the US Supreme Court has upheld LAWA.

At the county level, the Maricopa County Sheriff's Office (MCSO) (the infamous "Sheriff Joe") has continued to actively investigate leads concerning fraud and stolen identities, which often leads to an employer's place of business. While such leads can manifest through a variety of ways, spanning tips from the public to undercover sting operations, the target of these investigations have so far focused on apprehending individuals with fraudulent or stolen identities. If necessary, MCSO has raided businesses to round up multiple individuals working as employees.

The federal government has also been more active in pursuing employers through a series of "silent raids" or "desk audits" as opposed to large-scale worksite raids. A desk audit involves a comprehensive review of Form I-9 (employment eligibility verification form) triggered by tips, investigations, and/or policy initiatives. Recently, for example, Immigration and Customs Enforcement (ICE) initiated a new round of Form I-9 audits that targeted 1,000 employers throughout the country. The employers targeted included small and large businesses alike in all industries, with a focus on those businesses related to critical infrastructure. This audit initiative came in the wake of several other waves of audits: July 2009 (652); November 2009 (1,000+); March 2010 (180); September 2010 (500). Since the start of the 2010 fiscal year, ICE has collected more than $5.3 million in penalties, initiated more than 2,500 cases, and has arrested almost 200 employers, with many of those arrests leading to convictions.

Since immigration issues go hand in hand with potential discrimination issues, the increased ICE activity has also led to an increase in activity from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). OSC enforces the anti-discrimination provision of the Immigration and Nationality Act (INA), which prohibits:

1. Citizenship status discrimination in hiring, firing, or recruitment or referral for a fee
2. National origin discrimination in hiring, firing, or recruitment or referral for a fee
3. Document abuse (unfair documentary practices during the employment eligibility verification process)
4. Retaliation or intimidation

Of course, discrimination cases can also lead to an investigation from the Equal Employment Opportunity Commission (EEOC), which enforces the anti-discrimination provision of Title VII of the Civil Rights Act of 1964, as amended. For those employers using E-Verify, US Citizenship and Immigration Services (UCIS) has announced enhanced monitoring in its systems, collectively called the Compliance Tracking and Management System (CTMS). CTMS is designed to curtail abuse, fraud, or misuse of E-Verify through a range of monitoring and compliance activities that includes reviewing documentation and researching and documenting certain

non-compliant employer categories of behaviors, such as employer's pattern of issuing fraudulent A numbers and/or social security numbers or an employer's failure to consistently use E-Verify, if at all, once registered.

States that rely heavily on industries providing manual and menial labor jobs (construction, service industry/hotels, and fast food/casual dining) seem to have been hit the hardest by recent immigration enforcement activities. This is true not only because they seem to have been the industries targeted by local law enforcement raids, but also because of stepped-up ICE enforcement. Additionally, even those who have not been the subject of raids or ICE audits know the risks they run by ignoring the makeup of their workforce. As a result, we have seen more of these employers (those employing manual and menial labor) become more proactive in trying to ensure that they employ only individuals authorized to work in the United States.

States with strong immigration laws will most likely continue to prosecute individuals with stolen identities while the federal government will continue to investigate and prosecute employers.

Economic Factors Influencing the Employment of Immigrants

There is a direct relationship between the state of the economy and the hiring of foreign nationals, both at the professional level and at the manual labor level. If companies can fill their hiring needs with individuals who are already in the United States and have authorization to work, it makes both practical and economic sense to do so. Sponsoring foreign nationals so they can obtain non-immigrant work visas is an expensive proposition with current filing fees alone for an H-1B visa (used to bring professionals to the United States to work) reaching over $2,300 with an extra $1,225 if the employer wants to utilize premium processing, which guarantees some response from USCIS within fifteen calendar days. Moreover, with so many people still unemployed and looking for manual labor types of jobs, companies are less likely to engage in questionable hiring practices that can result in a portion of its workforce being unauthorized.

Although the United States continues to graduate thousands of individuals from institutions of higher education, many of whom cannot find

employment after graduation, there still appears to be a shortage of highly qualified workers with specialized skill sets, particularly in the computer area. Within the last year, there has been an increase in the number of companies willing to sponsor foreign nationals for work-related visas such as the H-1B, TN, and L visas. These visas are generally reserved for highly educated foreign nationals or individuals who fit into unique positions or are managers/executives or individuals with specialized skills.

Certainly, there was a dramatic decrease in the number of foreign nationals sponsored for non-immigrant work visas when the economy first faltered. This was seen perhaps most dramatically in the number of H-1B visas that were available long after the April 1 date when such petitions could be filed. In past years (prior to the economic downturn), we had years in which all of the 65,000 available H-1Bs were used up the very first day on which petitions could be filed (April 1) and USCIS had to use a lottery system to determine who would get the visas. These past few years the H-1Bs were available only until the summer months.

Employers who are considering using the H-1B visa category for any of its employees should strongly consider having those applications ready to be filed on April 1. Because successful H-1B petitioners cannot start working on their H-1B visas until the beginning of the fiscal year (October 1), there is generally no need to incur the extra expense ($1,225) of premium processing when filing the H-1B petition.

Key Compliance Issues for Employers of Foreign Workers

The current focus from the federal government in the immigration enforcement area is now on conducting I-9 audits versus conducting large-scale workforce raids. One could conclude that the government's shift in focus to conducting I-9 audits rather than large-scale raids is due to the fact that it is financially lucrative to conduct audits that can result in large fines to employers.

Among the hardest compliance requirements for employers to meet are the problems associated with hiring only authorized aliens—and the explosion of individuals who engage in identity theft. Even for employers who properly complete I-9s and use E-Verify, there is no way to be absolutely

sure that their employees are authorized to work in the United States. Individuals who steal another person's identity can still pass the E-Verify system and may have stolen documents that are actually originals. The employers who unknowingly or unintentionally employ these individuals may still find themselves losing a large portion of their workforce if the government uncovers the identity theft.

The Lawyer's Role in the Investigation Process

If the attorney represents the employer in an immigration investigation, the attorney's primary role is to minimize the client's liability and exposure. The first step is to carefully review the Notice of Inspection to determine the breadth and scope of the information requested. The attorney should carefully examine how to limit the responses to ICE, including determining the corporate entities that must respond. Often the Notice of Inspection will refer to parent companies or other affiliated companies and indicate that the response should include all of their information also. The attorney needs to determine if there is a good faith argument to limit the response to the company at hand. For example, it is quite possible that the parent company or affiliated company keeps its own I-9 records. Thus, the company served with the Notice of Inspection can legitimately contend that it does not have access to those records and therefore will not be responding on behalf of any other company. It is almost always in the client's best interests to limit the scope of the audit as narrowly as possible.

Once the company has properly interpreted and possibly narrowed the scope of the audit, the attorney needs to quickly get a handle on whether the company has I-9s for all of the employees and ex-employees to the extent required, and determine in what type of shape those I-9s are in. If the company has previously conducted periodic internal audits, the work at this stage should be minimal in terms of reviewing and making any necessary and appropriate changes. However, if the company has never completed an internal audit, the attorney will need to oversee a quick but thorough audit to determine the potential liability from the apparent technical and/or substantive violations. To the extent changes can be made to the I-9s, they should be made with the person making the change dating and initialing the change. The date should be contemporaneous with the correction and no backdating should otherwise occur. Special consideration

should be given to unionized workforces in order to not breach any collective bargaining agreements.

It is rare that an I-9 audit does not uncover problems with the I-9s. Typically the attorney will find substantive, technical, and procedural violations. Substantive and procedural violations include things such as failing to have any I-9 for the employee, late preparation of the I-9 (not within three days of hire), failure to include employee's name or signature in section 1, failure to provide the document title, ID number or expiration date of a List A, B or C document, failure to date Section 2, etc. Examples of technical violations include failure of employee to list his address or birth date in Section 1, failure of the translator to print his name in the certification box, failure to provide date employment began in Section 2, etc. For technical violations the employer has a ten-day correction period. No such correction period exists for substantive violations.

The civil penalty for paperwork violations ranges from $110 to $1,100 per violation. Thus, it is possible for there to be multiple violations on one I-9 form. Unfortunately, ICE then also applies an "enhancement matrix" that can increase or decrease the amount of the fine by up to 25 percent. The five factors that are to be considered in the enhancement matrix include:

1. Business size
2. Good faith
3. Seriousness
4. Unauthorized aliens
5. History

Given the above, it is important for the lawyer to address these issues up front, especially if they are favorable to the company. If the lawyer has a preexisting relationship with the company (i.e., was not hired just to assist with the investigation) then hopefully the company has already adopted several best practices that can be used as mitigating measures if a violation is found.

In addition to the five factors discussed above, the types of best practices that should be emphasized in the response if a company is facing an ICE audit include the following:

1. A policy/practice of centralizing the I-9 process with the person(s) in charge receiving periodic I-9 training from either DHS or other sources conducting regular audits.
2. Records demonstrating that the company has terminated new hires who present obviously false documentation, or existing employees who the company learns through some other means are not authorized to work for the company.
3. An explanation of the system the company uses to track expirations of work authorizations for individuals with time sensitive work visas or other work authorizations.
4. Evidence of prior voluntary in-house audits and explanation of how the company attempted to correct previously identified problem areas.
5. Records demonstrating steps the company took if it received any "no-match" letter from the Social Security Administration or notices from local law enforcement or state agencies that an employee was suspected of identity theft. This might simply include cooperation with the local authorities.
6. If the audit requests information about subcontractors and temporary labor, describe the efforts you have made to ensure that anyone contracting with you also complies with federal, state, and local immigration laws. This may include letters or other provisions in contracts in which the company has required the subcontractors to confirm adherence to the immigration laws.
7. If you are in a state that does not already require use of E-Verify and your client utilizes E-Verify, be sure to mention this fact. If you are in a state that already requires E-Verify, and your client uses E-Verify, you should mention it but do not expect to get any extra credit for complying with state law.
8. Using Social Security Number Verification Service (SSNVS) for wage reporting purposes. Make a good faith effort to correct and verify the names and social security numbers of the current workforce and work with employees to resolve any discrepancies.
9. Establishing a written hiring and employment eligibility verification policy.
10. Establishing a tip line mechanism for employees to report activity relating to the employment of unauthorized workers and a protocol for responding to credible employee tips.

11. Establishing and maintain appropriate policies, practices, and safeguards to ensure that authorized workers are not treated differently with respect to hiring, firing, or recruitment or referral for a fee, or during the I-9 E-Verify or SSNVS process because of citizenship status or national origin.
12. Arranging for regular I-9 audits by an experienced and knowledgeable third party.

Sometimes a lawyer is called into an ICE audit that quickly escalates into something more than a simple audit of I-9s. If you believe that there may be criminal aspects to the investigation, you need to recognize this early on and immediately bring a competent criminal attorney on the team from the beginning of the investigation. Because very few criminal attorneys have a substantive background in immigration law, it will be imperative that both the immigration attorney and the criminal attorney work hand in hand to ensure the best result for the client.

Challenges of the Enforcement Process

The fact that the government need only give three days' notice to the employer when conducting an I-9 audit presents challenges for clients and lawyers. This is especially true if the company being audited has not been conducting regular internal audits and catching and correcting mistakes as they go along.

If the employer has a large workforce, but a relatively small Human Resource (HR) department, it is very challenging for that employer to get their hands around all that needs to be accomplished within the three-day period and ICE rarely gives extensions. The audit typically asks for much more than simply the employer's I-9 forms. Quarterly tax statements, copies of contracts with subcontractors, and other reports usually are included in the audit request.

As a preliminary matter, the company's payroll records need to be compared to the I-9s to ensure that there is an I-9 for each person on the payroll and that an I-9 exists for ex-employees if their termination date requires an I-9 still be retained. (I-9s must be retained for three years from date of hire or one year from date of termination, whichever is longer).

Moreover, the I-9s need to be reviewed to ensure that any corrections that can be made are in fact made before turning them over to ICE. The person tasked with pulling this information together has a monumental task, especially if the workforce is large.

In order to meet these challenges, clients should ensure that the I-9 process is centralized if at all possible, and that the person responsible for having the I-9s completed is properly trained. Clients should also conduct internal audits yearly and take the opportunity in the course of those audits to correct any mistakes on their I-9s (while properly documenting those changes) and make any necessary corrections regarding how I-9s are completed. The audit should be handled by a third party (outside the company) to ensure that the auditor is not checking his/her own work.

Immigration Investigation Triggers and Responses

The triggers for an immigration investigation can include any number of things—a disgruntled ex- or current employee of the company; a competitor (in one case, an HR person in one company turned in a competitor company); a follow-up investigation by ICE because a previous audit resulted in a Warning Notice or Notice of Intent to Fine; selection due to industry type (construction/ service, etc.); relationship to critical infrastructure (nuclear plants or companies that serve critical infrastructures), or any various policy-driven initiatives, to name just a few.

When a client is apprised of an investigation, the client should call their immigration attorney; carefully review what is being asked for in the audit; assemble an internal team who has the ability to address the various items being requested; call a meeting with their attorney and internal team; determine the scope of the request and what can be objected to (not produced); delegate responsibilities and a timetable to ensure all information is gathered; appoint a point person and report any issue to that point person; have all I-9s reviewed and corrected to the extent possible; and assemble the materials for production, and produce them.

The lawyer's role in the process depends, in large part, on the sophistication of the client and the client's resources. The lawyer may have to serve as the "coordinator" and take charge of the process, ensuring that tasks are being

accomplished in a timely manner. In other situations, the lawyer may just be reviewing I-9s and indicating what corrections need to be made. Typically, the lawyer will prepare the cover letter to ICE, explaining the basics of the company, what its "best practices" are, and how it prepared for the audit.

Immigration Compliance Concerns—and Consequences of Non-Compliance

The primary compliance concerns for employers of a foreign worker include ensuring that the foreign worker has the proper work authorization; that the work authorization does not lapse, rendering the foreign national unable to work; that the proper amendments are filed if the foreign national's work responsibilities or job location change; and that the company considers its needs for the foreign national on a long-term basis (i.e., whether the company wants to sponsor the foreign national for a green card).

Failure to pay attention to these concerns can result in the need for the company to remove the foreign national from the payroll. The foreign national may fall out of status and begin accruing unlawful presence. If the company does not remove him/her from the payroll once their work authorization has expired, the company is in violation of the law as well and could face both civil and/or criminal penalties. Failure to engage in long-term planning can also result in the alien running out of time to process his green card and the need for the alien to leave the United States. For example, a non-immigrant on an H-1B visa must have filed his PERM labor certification before the beginning of his sixth year of H-1B eligibility or he will not be able to extend his H-1B beyond the normal six-year limit.

In order to address these concerns, companies are meeting with immigration counsel earlier and are including long-term planning issues in those discussions. Companies are also instituting "tickler" systems that remind human resource personnel of upcoming visa expirations (usually six months out).

The E-Verify System

The E-Verify program is an Internet based system that provides a link to government databases to determine the eligibility of new hires. The

program is administered by the USCIS and the Social Security Administration.

The federal government does not currently require all employers to utilize the E-Verify system. However, some states, such as Arizona, have passed legislation that does require companies to utilize E-Verify. Additionally some federal and state contractors and subcontractors are required to utilize it.

Early in the program, there was a high degree of incorrect non-confirmations, which lead to distrust in the program. Some employers also rebelled against the extra work since companies are still required to complete the I-9s before running names through the E-Verify system. Still, a large majority of companies that have utilized the E-Verify program for a period of time have positive reviews for the program, despite an occasional non-confirmation mistake. Many of the tentative non-confirmations are due to clerical mistakes—frequently involving individuals with two last names. The vast majority of these are eventually cleared to work. Also, E-Verify is now available to individuals to self-check their information to reduce the likelihood of encountering difficulties when the individual actually applies for a job.

The one problem with the E-Verify system is that there is really no way to protect against identity theft within the current system. This problem arises when a new employee steals not only the identity but also the documentation accompanying that identity and uses it to complete the I-9. Because the documentation is actually valid (just not for the individual using it), the employer does not suspect anything, particularly if the identifying information closely resembles the person using the false documents. When the employer then inputs the name and other identifying information into E-Verify, the system confirms that the information provided matches the name. Thus, even though a company correctly completes their I-9 forms and uses the E-Verify system, an employee could still not be authorized to work in the United States. That said, as Congress pours more resources into E-Verify, it is evolving to address this concern through the increased use of biometric tools and features.

Priorities for Immigration Law Worker Compliance

The priorities for maintaining immigration law worker compliance should be ensuring that the company fully complies with its I-9 requirements and, if applicable in their state, their E-Verify requirements; ensuring that workers with employment authorization expiration dates are tracked and managed so that there is no break in work authorization and no unintended unauthorized employment; and having a system in place for handling investigations if credible evidence is obtained that an existing employee may not be authorized to work.

Companies cannot afford to be told (pursuant to an ICE audit and findings) that a large percentage of their workforce does not have work authorization, leaving the company with no choice but to terminate them. The business cost of losing a large number of employees, and then having to train a new set, makes compliance a necessity.

Ultimately, the commitment for identifying the priorities in this area must come from the highest executive level within the company. However, there must also be a commitment from the human resources department, and ultimately, from the hiring managers/supervisors. A checklist that is used to maintain compliance in this area is intended not only as a document that should be used when first developing immigration compliance procedures, but should also be reviewed periodically to ensure that best practices continue to be followed. Again, it is important to keep in mind that any employee with a time limited work authorization must have their I-9 form updated, and all non-immigrant work visas have expiration dates.

Conclusion

There is a new and welcomed transparency occurring at the federal immigration level as government officials charged with revising and interpreting regulations are reaching out to attorneys and other "stakeholders" in an effort to solicit input and educate. These efforts are definitely a step in the right direction as they not only create dialogue between the government and attorneys and other stakeholders, but also help shape the interpretation of the regulations.

The need for reform of the immigration laws is great. For the first time in many years, member of both parties seem intent on engaging in real discussion about the undocumented individuals in the United States and possible ways to address this issue.

Key Takeaways

- Ensure that the government knows of all of the ways in which your client company has attempted to fully comply with the federal and state immigration laws.
- Encourage your clients to adopt "best practices" before they are facing an I-9 audit
- Recognize when there is a need to call in lawyers with other specialties. If there appears to be the possibility of criminal allegations, make sure a competent criminal attorney is on the team from the beginning of the investigation.
- Advise clients to ensure that the I-9 process is centralized and that the person responsible for having the I-9s completed is properly trained. Clients should also conduct internal audits yearly and correct any mistakes on the I-9s while properly documenting those changes. The employer has this responsibility even if they use a professional employer organization to complete their I-9s.
- Take charge of the investigation process if necessary, ensuring that tasks are being accomplished in a timely manner. Indicate what corrections need to be made. Prepare the cover letter to ICE, explaining the basics of the company, what its "best practices" are, and how it prepared for the audit.
- Join the American Immigration Lawyers Association (AILA) and be an active participant in the email exchanges that occur between AILA members on the state or local level. Participate in free webinars and seminars that are available to practitioners and invest in some good reference materials.

Related Resources

- Austin Fragomen, Jr., Careen Shannon & Daniel Montalvo, Immigration Employment Compliance Handbook 2011-2012 (West, Thomson Reuters, 2011)
- U.S. Immigration and Customs Enforcement (Worksite Enforcement, Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties Nov.25, 2008)
- Handbook for Employers (Form M-274) (U.S. Citizenship & Immigration Services, June 1, 2011 version)
- Guide to Selected U.S. Travel and Identify Documents (Form M-396) (Prepared by the Forensic Document Laboratory, U.S. Immigrations and Customs Enforcement
- E-Verify Employer Do's and Don'ts, Office of Special Counsel for Immigration-Related Unfair Employment Practices (U.S. Department of Justice, Civil Rights Division)
- I am an Employer, How Do I Complete Form I-9, Employment Eligibility Verification, (Form M-584) (U.S. Citizenship and Immigration Services Aug. 2008).

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Ms. Winterscheidt's practice in the immigration area is focused in the business immigration area, and in particular in bringing foreign nationals to the United States on work or investor visas and assisting them in obtaining green cards and eventually status as US citizens. She also has an active worksite enforcement practice. Ms. Winterscheidt is also a trained mediator and arbitrator.

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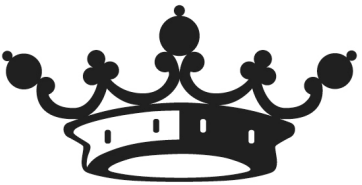

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