Employers Are Targeted by ICE's New Enforcement Initiative

Legal Alert
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Garvey Schubert Barer Legal Update, November 20, 2009.

In recent years U.S. Immigration and Customs Enforcement's (ICE) worksite enforcement strategy focused on the detention and removal of employees who are not authorized to work in the United States. On April 30, 2009, ICE's Office of Investigations issued a new worksite enforcement strategy — one focused on employers[1].

The new enforcement initiative increases the risk of significant civil penalties and possible criminal prosecution for employers who fail to comply with U.S. employment laws. In addition, the owners, supervisors, executives and HR managers of these employers face an increased risk of criminal prosecution, fines and incarceration for noncompliance, including "paperwork" violations.

Screening Requirements

All employers are required to complete and retain a Form I-9 for each individual hired for employment in the U.S. Completion of the Form I-9 requires the employer to review and record the employee's identity and employment authorization documents, accepting them only if they reasonably appear to be genuine and related to the individual presenting them. The employee and employer must swear under penalty of perjury that the statements each makes on the Form I-9 are true.

Employers are required to retain Form I-9 for three years after date of hire or for one year after termination, whichever date is later. ICE and a number of other federal agencies can demand production of the Form I-9 and related employment records through issuance of a Notice of Inspection (NOI).

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Enforcement Trends

In 2008, ICE's former enforcement strategy resulted in the arrest of more than 6,000 individuals, mostly through dawn raids on businesses carried out by armed ICE officers. Of the thousands arrested, only 135 were company managers, supervisors or owners. Following a February, 2009 ICE raid on a Bellingham, Washington business which resulted in the arrest of workers but not company managers or owners, Secretary of Homeland Security Janet Napolitano directed the agency to change its enforcement strategy.

The resulting enforcement guidelines require ICE officers to "obtain indictments, criminal arrests, or search warrants or commitment from a U.S. Attorney's Office to prosecute target employers *before* arresting employees for civil immigration violations at a worksite." See, www.ice.gov/pi/news/factsheets/worksite.htm (emphasis added).

While ICE will continue to arrest and process for removal any illegal workers found in the course of a worksite enforcement action, it will now focus its enforcement resources on employers who "knowingly" hire illegal aliens. ICE has not released the specifics of its new enforcement guidelines to the public, but it is reasonable to anticipate that the number of criminal prosecutions of human resources managers, supervisors and business owners suspected of knowingly hiring or retaining unauthorized workers will greatly increase in the future.

The federal criminal charges employers and their owners, supervisors and mangers could face include Harboring Illegal Aliens, Inducing Aliens to Enter the United States for Commercial Purposes, Making False Statements on a Form I-9, Aiding or Abetting an employee's false statement, and Conspiracy to commit immigration law violations.

As part of its new enforcement initiative, ICE took the unprecedented action of delivering NOIs to 652 businesses nationwide on July 1, 2009. The number of NOIs issued on that day surpassed the total ICE had issued for all of fiscal year 2008. According to the agency, this Form I-9 audit initiative is part of its new worksite enforcement strategy and is intended to hold employers accountable for their hiring practices[2]. ICE's new strategy covers the full range of options available to the government; including criminal prosecutions, civil fines and debarment.

On November 19, 2009, John Morton, ICE's Assistant Secretary, announced additional NOIs had been issued to another 1,000 employers[3]. The latest rounds of Form I-9 inspections were directed at businesses connected to critical infrastructure and key resources. Mr. Morton provided the following statistics regarding the NOIs issued since the April 30 worksite initiative was announced:

45 businesses and 47 individuals have been debarred from government contracting

142 NIFs issued totaling $15,865,181

45 Final Orders issued for $798,179 (*compare: ICE issued 8 Final Orders totaling $196,523 for same period of FY 2008*)

1897 cases initiated (*compare: 605 cases initiated during same period of FY 2008*)

1069 Form I-9 inspections (*compare: 503 Form I-9 inspections for all FY 2008*)

The significant increase in the number of NOIs, NIFs and Final Orders issued since the new policy went into effect is readily apparent when compared to the fine totals for the past decade. ICE's summary of Worksite Enforcement fines issued during fiscal years 1999-2009 demonstrates that final orders peaked at 312 in 2000 but dropped to zero in 2006[4]. Only 38 final orders were issued between January and June 2009.

Recent Prosecutions

Since the new enforcement strategy was announced, two companies and their key managers and owners have pled guilty to criminal charges.

On August 7, 2009, a Houston-based doughnut company agreed to pay a $250,000 criminal fine, to forfeit $1.334 million to ICE, and to be under court supervision for three years after pleading guilty to Harboring Illegal Aliens. The doughnut company's warehouse managers and supervisor, who were responsible for hiring and terminating decisions, also pled guilty to criminal charges for hiring or continuing to employ illegal aliens. They were sentenced to six months' probation and received fines ranging from $1,000 to $6,000.

On August 17, 2009, two members of the family that owned the Bellingham, Washington company, whose raid led to the strategy change, pled guilty to federal charges for knowingly hiring undocumented workers. In their plea agreements, one of the company's owners admitted that she knew a former employee who had left the company following a 2005 Form I-9 audit by ICE, had been rehired in June 2006 after completing a new Form I-9 with identity documents that did not belong to the employee. The company director pled guilty to aiding and abetting an administrative employee of the company who had accepted the false documents and used them to satisfy Form I-9 requirements. The other owner admitted that she knew that the company's human resources department had engaged in the practice of using false information to complete Form I-9s, but took no steps to stop or alter the practice. The company later plead guilty, was fined $100,000 and its owners were placed on probation.

Recent Administrative Law Judge Ruling

The Department of Justice's Office of Chief Administrative Hearing's Officer (OCAHO) adjudicates appeals of NIFs issued to employers by ICE. During the past decade, OCAHO issued few decisions regarding employer sanctions. It is likely that OCAHO will have the opportunity to issue more rulings on employer sanctions in the coming years based on ICE's new worksite employment strategy. Where those rulings will assist employers seeking to reduce the fines imposed in a NIF remains unclear, but a recent decision was not promising.

In a decision issued July 1, 2009, OCAHO ruled that a "good faith" defense was unavailable in a paperwork violation case[5]. It also held that complying with an ICE subpoena and request for documents was not a defense to a NIF. The Administrative Law Judge refused to dismiss the NIF based on the 11 month delay between the time the ICE investigation began and the date the NIF was issued.

Finally, the ALJ observed that while ignorance or inadvertence may be considered as a mitigating factor when ruling on the NIF, it was not a defense to liability on a paperwork violation. The ruling suggests that employers will not be able to avoid significant fines based on cooperation after the fact, good faith or ignorance of the law.

What You Can Do to Reduce Your Personal and Corporate Risks

If *you* have concerns that illegal aliens have been knowingly hired or retained, contact a white-collar defense attorney experienced in immigration cases. Counsel can advise whether you need to conduct an internal investigation to determine the facts.

If *your company* has received an NOI on or after July 1, 2009, contact an experienced immigration attorney immediately for advice. If possible, consider conducting Form I-9 audit and properly correcting any errors in compliance with legally accepted standards.

If *your company* is a target of an ICE raid or a criminal search warrant related to employment practices, contact a white collar defense attorney experienced in immigration matters immediately, as a criminal investigation is already underway. Keep in mind that the arrest of employees for civil immigration violations likely means that your company has been targeted for criminal prosecution.

And, if *you or your company* receives a grand jury subpoena for testimony or documents concerning the completion of Form I-9s, understand that both may be the subject of an ongoing criminal investigation and you should contact a white-collar criminal defense attorney experienced in immigration matters before responding.

If your company does not have and consistently follow a policy of compliance with Form I-9 requirements, contact an attorney with knowledge and experience auditing Form I-9s and drafting policies for compliance.

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[1] See April 30, 2009 Memorandum from Marcy M. Forman, Director, Office of Investigations.
[2] See Forman April 30, 2009 Memorandum, p. 2-3.
[3] See U.S. Immigration and Customs Enforcement News Release (November 19, 2009).
[4] See Employer Worksite Enforcement Fine Summary.
[5] *US v LFW Dairy Corp.*, 10 OCAHO 1129, 2009 WL 2712409 (OCAHO July 1, 2009).