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IGNORANCE THAT ISN'T BLISS

Why employers can't afford to
turn a blind eye toward undoc-
umented workers

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In recent days, federal prosecutors and Agents have dramatically enhanced their efforts to combat the employment of undocumented workers in the U.S. Where once the government relied on administrative fines to sanction employers who hired undocumented workers—either knowingly or by failing to properly verify work authorization—they now bring criminal charges, levy heavy fines and seize assets.

The primary investiga-
tion and enforcement



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organization in this effort is the U.S. Immigration and Customs Enforcement (ICE), which was created in 2003 as part of the Patriot Act. Under the Immigration Reform and Control Act (IRCA), 8 U.S.C. §1324(a) and 8 U.S.C. §1324a, the government has a multitude of charging options to punish companies for hiring undocumented workers.

Stiff Penalties

The most obvious choice is 8 U.S.C. §1324(a)(3)(A), which states that, if an employer knowingly hires at least 10 employees in a 12-month period with actual knowledge that they are not lawfully admitted for permanent residence or authorized to be employed, the employer has committed a felony and can be heavily fined and imprisoned for up to five years.

Even a misdemeanor charge of illegally



hiring or recruiting undocumented workers, retaining such workers after learning of their unauthorized status, or failing to properly complete a Form I-9 can result in serious criminal penalties. Under 8 U.S.C. §1324a(f), an employer can be imprisoned for up

to six months and face up to \$3,000 in fines per unauthorized worker if the employer is found to have engaged in a "pattern or practice" of knowingly hiring or recruiting unauthorized workers, or of merely failing to comply with the government's various protocols for verifying the employment eligibility status of workers.

Furthermore, the government will hold companies liable for the workplace immigration violations of their subcontractors. Last year, ICE's worksite enforcement investigation of Wal-Mart Stores Inc. and some of its subcontractors resulted in a total settlement and forfeiture of \$15 million, an amount

that represented the largest worksite enforcement penalty in U.S. history and surpassed the sum of all administrative fines from the previous eight years.

Aggressive Measures

These are not the only statutes that companies and their lawyers need to worry about. Recent charges brought against companies who hire undocumented workers illustrate that the government is now employing an aggressive and creative prosecutorial approach to the problem.

In addition to the hiring provisions of IRCA, employers are also being charged with the illegal "harboring" of aliens, under 8 U.S.C. §1324(a)(1)(A)(iii), based solely on the fact that the company employed the aliens. Harboring an alien who has "come to, entered, or remains in the United States in violation of the law," is a felony charge that carries with it the potential for heavy fines and up to 5 years of imprisonment. The same penalties apply to the felony charge of "transporting" an undocumented worker (8 U.S.C. §1324(a)(1)(A)(ii)), which can be triggered if an employer provides transportation to or from the workplace or even to and from the airport upon arrival, or of "encouraging or inducing" an alien to enter or reside in the United States in violation of the law (8 U.S.C. §1324(a)(1)(A)(iv)), which can be triggered by an employer advertising for or recruiting workers from outside the United States.

Furthermore, if the government can prove that the harboring, transporting or encouraging was done "for the purpose of commercial advantage or private financial gain," the term of imprisonment can double to up to 10 years. Even

more severe, an employer found guilty of "bringing in" or attempting to bring in an alien into the U.S. in violation of the law is subject to a mandatory minimum sentence of three years in prison, where the employer acted for "commercial advantage or financial gain."

According to prosecutors, employers may be subject to this statute when they recruit foreign employees and facilitate their arrival in the United States.

On top of fines and imprisonment, if the government can prove a company benefited or derived profit from the employment of illegal workers, it can seek forfeiture of a company's assets. Companies are also being charged with identity fraud, document fraud and Social Security fraud relating to their interactions with undocumented workers.

Assets At Risk

The specter of an employer being charged with these crimes is very real. On Feb. 22, ICE and IRS jointly announced a 23-count felony indictment charging three executives of a national cleaning company with harboring illegal aliens for profit and related tax crimes. Employees were arrested at 63 locations in 17 states, as well as in D.C. On Feb. 27, five former managers from a pallet and crate maker pleaded guilty to hiring undocumented foreign workers.

Months earlier, ICE had arrested more than 1,000 people at more than 40 company sites throughout the U.S.

On March 2, the president and co-owner of two temporary labor service companies was sentenced to 15 months in prison for conspiring to provide illegal workers to a national air cargo firm. The president was fined \$25,000 and forfeited personal property. The companies were

also required to forfeit \$12 million.

On March 6, the owner and three managers of a Massachusetts high-end leather manufacturer that had more than \$91 million in U.S. military contracts were arrested for allegedly hiring illegal immigrants. The owner, the plant manager, the payroll manager and the office manager were each charged with felony conspiring to encourage or induce illegal aliens to reside in the US as well as with conspiring to hire undocumented workers.

In order to avoid criminal prosecution in today's enforcement climate, it is imperative that employers establish effective employment verification systems and that companies comply with these systems. Instead of turning a blind eye to its workers' employment eligibility status, an employer must regularly audit its own workforce. It also must have a system in place to respond to reports of undocumented workers from other company employees and to effectively deal with Social Security Administration "No-Match" letters. At the same time, in establishing hiring practices that ensure an individual's work eligibility, an employer must be careful not to engage in unlawful discrimination against potential hires.

A company's actions, prior to any investigation by the government into the presence of undocumented workers at its workplace, could dramatically reduce the possibility of heavy fines, forfeiture of company assets, and criminal prosecution. ■