

Feel the chill: ICE targets employers for immigration violations



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Federal prosecutors and agents have significantly increased their efforts to combat the employment of undocumented workers in the United States. The primary investigation and enforcement organization in this effort is the U.S. Immigration and Customs Enforcement (ICE), which was created in 2003 as part of the Patriot Act. Many companies are under the false impression that the punishment for workplace immigration violations consists of a fine – simply the cost of doing business in today's economic reality. The days where an employer or company would merely be hit with a fine, however, are long over. In fact, ICE has all but abandoned administrative fines in favor of criminal charges against managers and owners and the seizure of company assets.

ICE wants employers to know it means business. As ICE assistant secretary Julie L. Myers put it, "If you're blatantly violating our work-site enforcement laws, we'll go after your Mercedes and your mansion and your millions. We'll go after everything we can, and we'll charge you criminally."

This isn't just tough talk: Criminal arrests for violations in work-site enforcement investigations have increased from 25 in fiscal year 2002, the year before ICE was founded, to 716 in fiscal year 2006. That's managers and owners being arrested – not the undocumented workers themselves. Last year, ICE's work-site 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 work-site enforcement penalty in U.S. history and surpassed the sum of all administrative fines from the previous eight years.

In today's prosecutorial climate, here are five tips every employer should keep in mind:

1. Assess the current compliance with immigration laws

Based on the government's aggressive investigation of workplaces, employers must protect themselves by evaluating whether they are complying with immigration laws. Having a law firm do an immigration "audit" of the company will not only help identify undocumented workers who should not be working for the company, but will also shed light on the shortcomings of a company's hiring and documentation procedures and practices. In addition to fixing existing problems, a company's good faith self-assessment is likely to be a valuable talisman against future prosecutions should the government become aware of a violation.

2. Craft a business immigration work-force compliance program

In addition to assessing the company's current compliance with immigration law and fixing any problems it finds, the company should ensure continuing compliance with such laws. A compliance program should be uniquely tailored to a company's needs, but should address the following issues: How does the company determine whether its foreign workers have authorization to work in the U.S.? How does the company ensure its workers have work authorization without running afoul of unlawful discrimination claims and other employment issues? How are the company's I-9 forms reviewed for compliance? How are the I-9 forms stored? What is the company's identification verification procedure? What is its self-auditing procedure for I-9 forms? How are hiring managers or HR personnel trained in I-9 procedures and document evaluation? What is the company's response to certain "warning signs" that a particular worker might not be authorized to work in the U.S.? Clearly, the answer to these questions won't be the same for every company – the important thing is that companies need to start asking themselves the questions.

Often, employers have some evidence of the presence of undocumented workers in their company. The information can come from a variety of sources – an employee who reports a suspicion that a co-worker is unlawful, a Social Security Administration "No-Match" letter, a person who contacts the company stating they have received a W-2 form even though they have never worked there, or information from other sources such as a health plan administrator. It is imperative that the company have a planned response to such events. The government will view a company's failure to respond to such warning signs harshly.

3. Consider relationships with subcon-

tractors and vendors

A company may be held responsible for immigration law violations by a contractor or vendor. In fact, last year the government obtained \$11 million in penalties from Wal-Mart related to the hiring of undocumented workers by cleaning subcontractors, not by the mega-store itself. Employers clearly cannot turn a blind eye to the hiring practices of its subcontractors and vendors.

4. Pay attention to warning signs and treat all interactions with ICE seriously

When an ICE agent arrives at a workplace, he or she is probably not interested primarily in deporting illegal workers. Instead, ICE is most likely investigating the company and its managers, including evaluating whether to recommend that criminal charges be brought. All ICE visits should be treated seriously.

Usually, the government's investigation of a company begins long before an ICE agent knocks on the door. Most likely another agency, like the state Department of Labor or Revenue Services, the state attorney general, or even a disgruntled ex-employee, alerted ICE to potential immigration violations at the workplace. Even if ICE is initiating the investigation, agents may have already gained the cooperation of employees and ex-employees and have reviewed tax and labor records of the company.

5. Get advice from counsel

Don't assume that because the government is asking about undocumented workers in that workplace, that the company needs an immigration lawyer. In fact, considering today's climate, a company needs a holistic approach. You should engage counsel who understands the intersection of criminal defense law, immigration law, as well as employment and labor law.

The government's focus on investigating and prosecuting employers for immigration violations is unlikely to abate anytime soon. ICE's 2007 budget request sought \$41.7 million in new funds and 171 additional agents to enhance ICE's work-site enforcement efforts. Employers should take steps to ensure they don't become another ICE statistic.

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