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ICE Enforcement Targets Employers: Preventive Actions to Think About

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In fiscal year 2010, U.S. Immigration and Customs Enforcement ("ICE") conducted more than 2,200 audits of employers nationwide. In part, as a result, criminal immigration charges were filed against a record 180 owners, employers, managers and/or supervisors.

The charges ranged from misdemeanors, including knowingly hiring unauthorized workers, to felonies as diverse as harboring illegal aliens, filing false tax returns and aiding and abetting identity theft. And there is no sign that this enforcement trend is abating. Rather, all signs point to an increased focus on employers. In particular, employers in industries that historically have had a higher percentage of unauthorized workers; that is, the food, hotel, cleaning services and construction industries are all under scrutiny.

For example, in November and December of last year, ICE announced multiple charges against a couple in San Francisco who own a chain of Bay Area Mexican restaurants, Arkansas restaurant owner's plea and sentence, which includes forfeiture of his residence and car, and a Dunkin' Donuts manager's guilty plea to employing unauthorized workers.

The reason for the uptick in ICE worksite enforcement actions is twofold. First, in response to advocacy groups' complaints regarding the perceived unfairness in the Bush administration's policy of raiding places of employment and arresting and deporting the workers with no action being taken against the employers, the Obama administration has made a point to turn its efforts to targeting and prosecuting employers. During a speech in November 2009 at the Center for American Progress in Washington, D.C.,

Secretary for Homeland Security, Janet Napolitano, said, in explaining the differences in the current administration's enforcement efforts, "[w]e've transformed worksite enforcement to truly address the demand side of immigration." Click here to read more.

Second, the recession has put into high relief the argument that jobs in the United States need to be for U.S. workers. The ICE website states:

ICE has a vital responsibility to enforce the law and engage in effective worksite enforcement to reduce the demand for illegal employment and protect employment opportunities for the nation's lawful workforce. ICE and our law enforcement partners will continue to bring all of our authorities to bear in the fight using criminal charges, asset seizures, administrative arrests and deportation.

The law provides ICE with fairly serious tools to effectuate its fight. For example, although knowingly hiring an unauthorized worker is a misdemeanor, the same action could be viewed as a felony. Under the current law, mere employment of an illegal alien, which used to be written into the statute as insufficient for a harboring charge, can now support a harboring charge. Anything that encourages "an [illegal] alien to . . . reside in the United States" "or substantially facilitate an alien remaining in the United States" can constitute the crime of harboring. 8 U.S.C. § 1324(a)(1)(A)(iv). See *U.S. v. Kim*, 193 F.3d 567 (2d Cir. 1999).

Even in the absence of any allegations of illegal employment, ICE is engaging in very aggressive enforcement against mere paperwork violations. For example, one of the highest civil penalties (exceeding $1 million) assessed against Abercrombie and Fitch was for electronic I-9 system failure, without a single allegation of having unauthorized workers on its payroll.

And it is not just employers who abuse their workforce for financial gain that are being targeted. Multinationals such as IFCO Systems, N.A., Inc., a pallet company with over 40 plants in 26 states and a total overall workforce in the tens of thousands, and well-respected Fortune 100 companies such as Wal-Mart have been targeted by ICE.

Nor does the employer need to actually know that his or her employees are illegally in the country or not authorized to work to be guilty under 8 U.S. C. § 1324 or 1324a, respectively. The test under the harboring statute, 8 U.S.C. § 1324, is "reckless disregard." "Reckless disregard" has been found to exist when employers (1) filed labor certifications on behalf of employees stating that they had certain skills that they, in fact,

did not have, *U.S. v. Singh*, 628 F.2d 758 (2d Cir. 1980); (2) failed to complete I-9s properly, *U.S. v. Shipley, Do-Not Flour and Supply Co.,* 4:08- cr – 00576 (Sept. 5, 2008) (50% of the I-9s were deficient and many were completed years after the workers were hired); or (3) ignored no-match letters sent to the employers by SSA. Id.

Similarly, constructive knowledge of the employees' lack of work authorization documents is sufficient under the "knowing hire" statute. 8 U.S.C. § 1324a. As with most criminal statutes, constructive knowledge can be a "knowing closing of the eyes."

On the other hand, the same Department of Justice that works hand in hand with ICE prosecuting employers for knowingly hiring unauthorized workers, also prosecutes employers under the antidiscrimination provisions of the immigration laws for requiring non-U.S. citizen employees to provide more documentation than asked of from citizen employees. Click here to see the Hoover settlement*;* Click here to see Catholic Healthcare West.

What is an employer to do? An I-9 audit by an immigration attorney who can spot suspect documents is a necessary first step. Companies should also consider tightening internal controls relating to hiring and payroll procedures and ensuring that the Compliance Department or Chief Compliance Officer reviews and responds to government inquiries regarding employees' social security numbers, wages or other identifying information. A simple response, with no follow-on investigation, may simply not be enough. Finally, if ICE does come knocking, no employer should assume it is a routine civil audit of its I-9s. Although it may well be, if the audit morphs into a criminal investigation, consulting with criminal immigration counsel at the outset may be the wiser approach.

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