SEYFARTH SHAW

Management Alert

Following a Long Thaw, ICE Returns with Increased Worksite Enforcement

By Dawn M. Lurie

Seyfarth Synopsis: *"ICE will enforce the law, and if you are found to be breaking the law, you will be held accountable." Referring to Immigration and Customs Enforcement's (ICE) early morning raids at nearly a hundred franchisee convenience stores across the nation, the ensuing public comments from agency officials confirm that 2018 will be a year of increased immigration enforcement. ICE investigations can result in the arrest of employers and employees and the imposition of large-scale fines; under the current Administration, though, it's not only ICE that companies need to consider. Following the "Buy American, Hire American" Executive Order, a myriad of reinvigorated agencies that span all parts of the government have increased immigration-related oversight. Employers should proactively prioritize addressing immigration compliance.*

What Happened?

The January 10, 2018 reports of early morning nationwide "raids" at nearly 100 franchisee convenience stores confirmed the anticipated increase in worksite enforcement. Following the pre-dawn visits by Immigration and Customs Enforcement (ICE) agents, where some employees were checked for employment authorization and others arrested, Acting ICE Director Thomas Homan warned employers that "**today's actions send a strong message to U.S. businesses that hire and employ an illegal work force: ICE will enforce the law, and if you are found to be breaking the law, you will be held accountable.**" His statement went on to say: "**Businesses that hire illegal workers are a pull factor for illegal immigration and we are working hard to remove this magnet. ICE will continue its efforts to protect jobs for American workers by eliminating unfair competitive advantages for companies that exploit illegal immigration.**" With the new Administration's one-year anniversary approaching, there is no doubt that increased and aggressive immigration enforcement is underway.

The Past, Present and Future

The Administration appears to be combining the successful tactics of both the Bush and Obama eras, with a large scale enforcement action coordinated at the national level including administrative arrests of employees **and** requests for Forms I-9 through a Notice of Inspection (NOI) to the employers. In connection with the most recent worksite raid, Derek Benner, Acting Executive Associate Director, Homeland Security Investigations (HSI) told the Associated Press: "This is what we're gearing up for this year and what you're going to see more and more of is these large-scale compliance inspections, just for starters. From there, we will look at whether these cases warrant an administrative posture or criminal investigation." ICE's HSI component oversees cases against employers. In 2017, the largest judgment in U.S. history for illegally employing undocumented immigrants was levied against Asplundh Tree Expert Co.—the company had to pay a total of $95 million in forfeitures and civil claims. At the time, ICE contended that "the highest levels of Asplundh management remained willfully blind while lower level managers hired and rehired employees they knew to be ineligible to work in the United States."

Worksite enforcement, including the widespread arrests of employees, was a favored enforcement tool during the Bush years before falling out of favor under the Obama administration. During the Obama administration, desk audits, in which ICE requires the employer to submit I-9s and their supporting documents rather than conduct an onsite review, became the preferred tool. Even so, the numbers declined—in 2016, ICE conducted 1,279 audits of I-9s, assessing employers $17.2 million in fines, which was a drop from the 3,127 audits conducted in 2013. Now, not only is worksite enforcement back on the rise, but the civil monetary penalty amounts also have risen, with the increases effective for civil penalties assessed after February 3, 2017, whose associated violations occurred after November 2, 2015.

IMAGE and the Culture of Compliance

"ICE's worksite enforcement strategy continues to target both employers who knowingly hire unauthorized workers and the workers themselves," according to a statement by ICE. The ICE spokesperson went on to say, "As Acting Director Homan stated, he has directed ICE Homeland Security Investigations to step up its efforts in this area—to include pursuing more investigations and conducting more I-9 audits."

ICE's Three-Pronged Approach

Recently ICE issued a press release, outlining a revitalized strategy. The ICE strategy incorporates a three-prong approach to worksite enforcement: "compliance, thorough I-9 inspections, civil fines and referrals for debarment; enforcement, through the arrest of employers knowingly employing undocumented workers, and the arrest of unauthorized workers for violation of laws associated with working without authorization; and outreach, through the ICE Mutual Agreement between Government and Employers, or IMAGE program, to instill a culture of compliance and accountability.

The BAHA Bandwagon

What was predicted throughout 2017 is now occurring in 2018: increased enforcement. With the "Buy American, Hire American" (BAHA) Executive Order and the Administration's focus on immigration, ICE is not the only agency to be mindful of when considering compliance with immigration related laws and regulations—other agencies are falling in line. It is clearly a priority for this Administration, and companies across the U.S. will now experience increased interest not only from ICE, but from a plethora of government agencies tasked with protecting U.S. workers and jobs.

The dramatic uptick in enforcement comes as agencies across different Departments of the federal government increase their efforts to coordinate immigration-related matters following the BAHA Executive Order. As the orders from the top filter down to the agencies, both large and small, ICE, U.S. Citizenship and Immigration Services (USCIS), the Department of Labor (DOL), the Department of State (DOS), and the Department of Justice (DOJ) have all increased their focus on protecting US workers and ensuring that employers have a "legal workforce.

Department of Justice Initiative

Different components of the DOJ have touted increased immigration enforcement. Recently, a federal grand jury brought charges against 20 undocumented immigrants for using fraudulent papers to obtain employment. The U.S. Attorney for the Western District of Tennessee said the indictments showed DOJ's "renewed commitment" to criminal immigration enforcement, saying "these indictments… promote lawfulness in our immigration system." Elsewhere in the Department, the Civil Rights Division's Immigrant and Employee Rights Section (IER) launched its Protecting U.S. Workers Initiative to protect U.S. workers from discrimination, settling at least two such claims already. As part of the Initiative, IER also entered into a Memoranda of Understanding with other Departments, mostly recently with DOS' Bureau of Consular Affairs, increasing interagency cooperation.

USCIS Actions

Finally, USCIS continues to make news, most recently with its termination of Temporary Protected Status (TPS) for several countries, which affects the employment authorization of hundreds of thousands of individuals. USCIS' E-Verify program has also increased its oversight of employers who use the program. More importantly, the government's FY 2018 budget mandates the use of E-Verify, and, while that may not occur, companies would be wise to learn more about the program. For companies already using E-Verify, they should ensure that they are compliant with the program's rules. The Associate Director of Immigration Records and Identity Services Directorate, Tammy Meckley, recently stated that E-Verify would be moving from its historically soft compliance posture to a more forceful compliance position. To start, E-Verify has started sending out letters to companies, specifically to those with federal contracts, who do not appear to be complying with the FAR E-Verify clause. Meckley also noted that E-Verify conducts onsite inspections of companies enrolled in E-Verify but who may not be compliant.

What Can Employers Do?

1. **Conduct an Internal Assessment**. Have experienced counsel review your policies, processes, and sample I-9s, and decide if a full I-9 audit or broader cross section is necessary. The assessment should review immigration language in vendor/supplier and staffing contracts and could also review general visa compliance for companies that sponsor foreign nationals. Visits to company sites should be considered as well as a review of the E-Verify process and E-Verify account reports for those who are enrolled in the program.

2. **I-9 Internal Audits and Remediation**. The Form I-9 is said to be the most complicated 3-page form in America. Failure to follow the appropriate guidance in the I-9 verification process can lead to civil fines, forfeitures, criminal penalties, and even government contractor debarment. After a general assessment of immigration compliance, companies should consider an internal I-9 audit under the direction of experienced counsel. Perhaps even more important than the audit itself is the remediation of the Forms I-9 after identifying paperwork violations, missing forms, expired work authorizations, fraudulent documents and other issues. It is important to address the more serious issues as quickly as possible. Being proactive will reduce fines and penalties and also establish a good faith defense in the face of an ICE audit.

3. **Review/Establish Policies and Procedures**. The Asplundh case reminded us that upper management and executives face the largest risks from "willful blindness" to the implications of decentralized practices. Management cannot turn a blind eye to what is happening in the field and should insist upon compliant practices. Don't Ask, Don't Tell-based immigration policies are something ICE appears to be interested in targeting. Companies should look at pre-hire applications, I-9 retention schedules, photocopying policies, Social Security number-related "mismatch" issues, reverification and other processes to ensure compliance with the law and, from an anti-discrimination perspective, consistency. Any policy should be thoughtful, useful and in circulation. Polices that sit on a shelf and are not disseminated to Human Resources or other I-9 Administrators can cause more harm than good. Another thought is to consider investing in a reputable electronic I-9 system (after conducting diligence on the product) or updating your paper Form I-9 process.

4. **Train, Train, Train.** While tight policies and procedures can reduce errors, the churn of HR personnel, combined with the new Forms I-9 and updated USCIS guidance, makes ongoing reinforced training, job aids and in-house subject matter expertise critical. Aside from imparting technical knowledge, trainings should highlight the importance of the Form I-9 and the need to take the process seriously. Some companies have also opted to include a training component that targets management and focuses on the personal and professional exposure, civil and criminal penalties as well as the reputational and branding risk associated with government-exposed compliance failures.

5. **Prepare for a Government Visit**. We have written in depth about how a company may prepare for an eventual knock at the door by the government. Regardless of industry or company size, this is something for which every company should have a practical plan. Based on recent trends, companies that have had ICE over for dinner in the past 5 years should set a place at the table and be ready for another visit. Follow-up actions for companies dinged in the past should be expected.

ICE's latest action is a reminder that franchisors may have additional issues relating to their relationship with franchisees, specifically the level of control and supervision exerted over them. Franchisors need to consider what language should be in their contracts with franchisees; for example, whether they want to contractually bind their franchisees to comply with immigration laws and/or offer best practices and training programs. Specific contractual obligations could also include mandating third-party I-9 audits at the franchise locations, insulating a franchisor form direct knowledge of possible immigration-related violations while improving the franchisees' compliance. Especially if the franchisor is primarily responsible for certain activities (i.e. onboarding, including the storage of Forms I-9 for its franchisees, and payroll), now is the time to review the relationship agreements with its franchisees.

Given the clear message across agencies of stepped-up enforcement, the President's expressed focus on immigration issues, and a newfound emphasis on interagency cooperation, 2018 looks sure to be an interesting and challenging year for employers on the immigration compliance frontier. This is the time to pay attention and invest resources—it is crucial that companies prioritize compliance today to prevent problems tomorrow. Please contact the author, Dawn Lurie, at dlurie@seyfarth.com, or any member of the Seyfarth Immigration Compliance and Enforcement Team with questions. You may also wish to subscribe to the Seyfarth BIG Immigration Blog.