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Evolving Employment Authorization Enforcement

Law360, New York (April 21, 2009) -- Earlier this year, Immigration and Customs Enforcement (ICE) agents raided the Yamato Engine Services facility in Bellingham, Wash., arresting 28 employees who allegedly were not authorized to work in the United States. Last year, ICE conducted 1,103 criminal and 5,184 administrative arrests, so this event would seem routine.

But the new administration's response to its first ICE enforcement action was a sharp break from the past. The day after the raid, the secretary of Homeland Security testified to Congress that she had not known about it, declared "I want to get to the bottom of this," and ordered an immediate review.

According to news reports, several weeks later 27 of the 28 employees were released and given temporary work authorization documents in exchange for their cooperation with the investigation.

And in early April, the director of ICE's Office of Investigations testified before Congress that previously scheduled raids were undergoing further review. In the meantime, ICE has apparently not conducted additional raids.

Based on these developments, the conventional wisdom is that under the new administration ICE will simply shift its criminal enforcement focus from employees to employers. This is likely partially correct.

The administration's statements — and its decision to grant work authorization to illegal immigrants in exchange for cooperation — strongly suggest that the primary target of criminal prosecutions will no longer be the work force, but management.

Accordingly, the pressure on companies, executives and supervisors to ensure their work forces are authorized for employment will continue to increase, as they face greater risk of criminal prosecution and collateral consequences, including debarment from federal contracting.

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But recent developments indicate that ICE will likely also proceed on a second front. A company with a legal work force but inadequate employment-authorization records may avoid prosecution, but nonetheless face heavy civil fines and penalties.

ICE recently telegraphed its intention to tap this well: lost in the uproar over the Bellingham incident was the investigation director's congressional testimony that ICE has "restructured the worksite administrative fine process to build a more vigorous program."

To that end, ICE provided its field offices with a new set of standardized criteria on how to issue administrative fines, and reported to Congress its intent to "increase[] use of the administrative fines process [that] will result in meaningful penalties for those who engage in the employment of unauthorized workers."

When fit together, these puzzle pieces signal ICE's plans for a dual-track strategy of targeting employers through increased criminal and administrative enforcement.

So while companies must comply with the straightforward mandate not to employ unauthorized workers, they also must pay attention to the fine details of immigration regulations in order to avoid not only the risk of criminal enforcement but also significant civil monetary penalties.

Before demonstrating how employers may be affected by greater administrative enforcement, however, a brief discussion of employment authorization regulations is in order.

The Immigration Reform and Control Act requires all employers to complete the Form I-9 process for all employees hired after November 6, 1986, and the regulations in Part 274a of Title 8 outline the process by which employers must validate their employees' work authorization status.

First, the employee must complete Section 1 of the I-9 on or before the date the employee begins work (but after hiring).

In Section 1, the employee provides identifying information (name, address, date of birth, etc.), attests to his or her immigration status (citizen, national, resident or alien authorized to work), and signs and dates the form.

Translators may assist employees in filling out this section, in which case both the employee and the translator sign the form.

Then, within three business days of the employee's first day of work, he or she must present documents to the employer that show the employee's identity and authorization to work in the United States.

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The only documents the employee may present are those listed on the back of the most recent edition of the I-9 (which became effective on April 3, 2009).

The employer cannot dictate what documents it will accept: the employee may present any valid document from List A (that confirms both identity and employment eligibility), or a combination of valid documents from Lists B and C (that, respectively but separately, confirm identity and employment eligibility), as long as they are consistent with the employee's attested immigration status from Section 1.

The employer then must inspect the original documents, ensure they "appear to be genuine and to relate to the individual," 8 C.F.R. § 274a.2(b)(1)(ii)(A), complete Section 2 to record the documents inspected, and sign the form attesting to the date the employee began work and to the apparent authenticity of the documents.

Employees who cannot present valid documents within three business days must be terminated.

Finally, for any employee whose work authorization has an expiration date, the employer must "re-verify" the employee on or before that date. To do so, the employee must present a valid document listed on the current I-9 that demonstrates the employee is authorized to continue employment.

Like the process for initial verification, the employer either completes Section 3 if the employee presents valid documentation, or terminates the employee. While the process seems simple enough, it is easy to make mistakes, and errors are common. An employee forgets to check the Section 1 immigration status box.

In Section 2, an employer neglects to record the number on a document presented by the employee. An employer loses track of an employee whose work authorization expires, so the Section 3 re-verification is performed late — or not at all.

Or the employee presents an exceptional situation (presenting a receipt in lieu of lost documents, claiming Temporary Protected Status employment authorization, working for less than three days, etc.), in which case the standard procedure breaks down and more mistakes are made.

The high probability of I-9 errors is why employers should be concerned about the likelihood of greater administrative enforcement. Employers face civil fines for each "paperwork violation," and for each I-9 the employer is required to have but cannot produce.

Nor is the employer on the hook only for current employees—an employer must also keep I-9s of all former employees for three years from the date of hire or one year of the date of termination, whichever is later, and the employer can be fined for errors associated with those I-9s.

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An employer will be subject to additional civil fines if it is determined that any employee — current or former — actually was not authorized for employment.

Moreover, the absence of a correctly completed I-9 may leave an employer charged with knowingly employing an unauthorized alien unable to invoke the affirmative defense of "good faith compliance with the employment verification requirements." 8 C.F.R. § 274a.4.

Nor is that all. While strictly adhering to I-9 regulations, employers must also take care not to discriminate against employees or prospective employees on a prohibited basis when they do so.

For example, employers risk allegations of discriminatory "document abuse" by demanding that noncitizens produce a particular employment authorization document, requiring noncitizens to produce more documents than are required for verification, or requiring re-verification when not necessary.

Such practices may subject the employer to charges of national origin discrimination — and it appears that the new Administration intends to pursue this avenue aggressively.

Indeed, one Bellingham employee recently told a news agency that he was questioned specifically about evidence of discrimination at the facility. Such cases can subject employers not only to substantial civil fines, but also to claims for job restoration, back pay and other remedies.

So what can employers do in the face of increased I-9 enforcement? Employers should consider implementing a thorough I-9 compliance program.

First and foremost, such a program should include audits, which can help ensure that all current employees are authorized to work in the United States.

Further, I-9 audits provide an employer the opportunity to discover—and if possible, correct—any I-9 errors, which will decrease the maximum amount of any possible monetary penalties.

Nor is a one-time audit sufficient; because of ever-present factors such as turnover of HR personnel and the difficulties inherent in I-9 completion, audits should be conducted on a regular basis to ensure compliance.

Following an audit, employers should implement prospective policies that will minimize errors and possible liability, with a special emphasis on areas of common errors identified in the audit.

The first tier of any such policy is the knowledge base of those carrying out the I-9 process. Ideally, companies should have an in-house I-9 "expert" — typically either an HR or legal professional.

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The in-house expert (or an outside professional) should periodically train the personnel who complete the I-9s and review the documents.

An invaluable resource is the I-9 Handbook issued by U.S. Citizenship and Immigration Services (USCIS), recently updated to address many of the more arcane questions that may arise (available here: www.uscis.gov/files/nativedocuments/m-274.pdf). The Handbook should be required reading for all employees involved in the I-9 process.

In addition, both USCIS and the Justice Department Office of Special Counsel for Immigration-Related Unfair Employment Practices maintain employer hotlines to respond to inquiries (respectively, 1-800-357-2099 and 1-800-255-8155).

Employers should also consider implementing other error-minimizing control systems, such as a second independent review of all I-9s (including follow up with HR line personnel who make mistakes to ensure they understand the proper procedure), and a high-level review (possibly with legal advice) before any termination for failure to present evidence of work authorization.

Companies are also well-advised to implement a document retention policy, ensuring preservation of I-9s for the required period.

Further, many visa programs have intricate requirements in which the visa holder can only work under limited circumstances. Companies are well-advised to review their visa programs to ensure that they are fully compliant with employer-specific visa requirements.

They should also take reasonable steps to promote overall I-9 compliance by vendors, contractors and lessees, such as adding contract provisions requiring I-9 compliance, and following up on credible information suggesting noncompliance or unauthorized status of the employer's own employees or those of its vendors, contractors or lessees.

Employers must also pay close attention to any “no-match” letters they may receive from the Social Security Administration (SSA), issued when the W-2 information for an employee does not match the SSA’s records.

The Department of Homeland Security (DHS) issued a rule in 2007 that outlined safe-harbor procedures for employers receiving no-match letters: first checking the company’s records, then giving the employee 90 days to resolve the discrepancy, and finally completing a new I-9 if the mismatch remained unresolved (and terminating employees who do not offer sufficient documentation).

The rule was enjoined and is still in litigation, but prudent employers should take reasonable steps to follow up on no-match letters.

While no-match letters may be issued for a variety of reasons (e.g., name changes, typographical errors, and the like), the existence of unresolved Social Security number

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mismatches has been used by the government as evidence of an employer's constructive knowledge of the unauthorized status of employees, particularly in cases in which the employer has been notified of large numbers of such mismatches.

Further, although I-9 software does not eliminate the possibility of error because it relies on properly-entered data, it can include safeguards to reduce it — and importantly, should include the ability to track employees that require re-verification.

Employers also should consider using USCIS's E-Verify system, which provides near-instant checks against federal databases to ensure work authorization. Over 100,000 employers have already enrolled.

Employers also may wish to consider enrolling in the ICE Mutual Agreement between Government and Employers (IMAGE) program, in which the company agrees to undergo an I-9 audit and adopt certain best practices in exchange for IMAGE certification and the possibility of leniency should ICE find any I-9 discrepancies.

In the current climate, prudent companies should increase their efforts to ensure the soundness of their employment authorization verification procedures. ICE's notification of a forthcoming inspection is not the time to double-check the I-9s. Given ICE's recent statements and actions, that time is now.

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