

Enforcement

Employers Must Prepare for ICE Raids, Immigration Enforcement, Attorneys Say

NEW YORK—The U.S. Immigration and Customs Enforcement's emphasis on worksite enforcement and criminal penalties has created unprecedented challenges for employers trying to comply with immigration laws, attorneys said Oct. 10 at a conference sponsored by the Practising Law Institute.

Reflecting on a wave of worksite raids by ICE, former assistant U.S. Attorney Thomas E. Moseley said the new approach by the government is forcing employers to change how they view their immigration law obligations and also how they respond to the government.

"I think the real radical change here is use of criminal prosecution in connection with employer sanctions," said Moseley, who headed the immigration unit in the Southern District of New York and is now an attorney in Newark, N.J. "Before Homeland Security existed, the government almost never pursued criminal sanctions and now it is becoming routine."

"Immigration compliance is no longer something that can be an afterthought, unless you are prepared to have ICE knocking on your door," said Nancy-Jo Merritt of Fennemore Craig in Phoenix.

Nancy-Jo Merritt, who represents employers in immigration issues, agreed that the criminal sanctions are a new threat, but added that ICE and the Homeland Security Department have shifted the burden of immigration enforcement onto employers, which means employers need to act differently.

"Immigration compliance is no longer something that can be an afterthought, unless you are prepared to have ICE knocking on your door," said Merritt of Fennemore Craig in Phoenix. "Employers need to be much more intentional from the very beginning and be prepared for a possible investigation."

Compliance Starts with Applications. The first place employers can start in protecting themselves from enforcement actions is to make sure hiring processes and job applications are focused on immigration concerns, Merritt said. She suggested that employers should ask clear questions about work authorization on the application as well as giving warnings on the application about giving false information.

She also said it was important to let applicants know whether the employer is participating in E-Verify—the government's electronic employment verification system—and also to outline the anti-discrimination requirements under immigration law.

"There must be good attention paid by employers not just to protect from enforcement efforts, but also from discriminating against employees," Merritt explained.

One way to avoid discriminating against employees, Merritt said, is to make sure that company officials understand their obligations under immigration laws but

also that they understand what employers are not required to do. Using the example of conditional green cards, Merritt said employers are under no obligation to monitor whether the green card has expired and that once the employer has used the green card to complete an I-9, the obligation is over.

Monitoring Contractors, Temp Agencies. Another area where employers need to be vigilant is in monitoring workers hired by temporary agencies and contractors, Merritt said. While some companies believe that they can avoid liability by having the workers hired by a third-party, she said that approach has resulted in ICE raids and that the company is not immune from liability.

"We can't forget the basics of employment law in advising employers on hiring temporary or contract workers," Merritt explained. "Just because they are hired by someone else doesn't mean that employers don't have responsibility for the people in their workplace."

Even if the company is not held liable for the actions of a contractor, she emphasized that an ICE raid targeting a subcontractor still can paralyze the workplace and therefore it is important to ask questions about the procedures used by subcontractors.

Merritt suggested that in creating contracts with subcontractors and temporary agencies, it is not enough to insist that they comply with federal laws. She said it is also important to stipulate in the agreement how the subcontractor will provide notice about investigations and inspections, as well as to outline the procedures used to verify work authorization.

Preparing for the Raid. Although employers can take steps to avoid an enforcement action, Moseley said it is also important to make preparations for how the company is going to respond should a raid take place or if the government appears to be considering a major enforcement effort. One of the first concerns, he said, is how to handle a request to enter the business to conduct an investigation or interview workers.

"Employers ought to have in place a protocol for consent to enter premises," Moseley said, adding "and the decision should not be left up to the receptionist or the person at the front door."

Because ICE is permitted to enter a business based only on consent or a warrant, Moseley said that there needs to be a process in place to determine whether they will be allowed to enter the workplace and who gives consent. There also needs to be an evaluation of whether the warrant is appropriate and at what point the company's attorneys are called in to determine what the government can do.

Emphasizing that these decisions "should be made in the boardroom, not the lunchroom," Moseley said employers need to have a plan for how to respond to an enforcement action and that attorneys—including those familiar with criminal procedure—should be involved in policymaking.

Moseley explained that it is important to examine what kind of warrant is being offered by government officials and that officials are limited to investigate only those things included on the warrant or the subpoena. He said it was also important to realize that ICE may offer a "notice of inspection" to look at I-9s, but that those notices are not a warrant to enter the premises.

I-9 Inspections. “You have a right to say no at any time and you have the right to ask questions,” he said.

Merritt agreed that employers should be prepared to deal with an I-9 inspection and realize that it is not the same as a raid, both in the ramifications and the power of ICE.

She said that employers should not allow ICE to re-view I-9s on site and that instead the company should offer to bring the forms and documentation to ICE. She also said it was important to realize that even if there is a subpoena accompanying the I-9 inspection notice, that does not mean the employer should just start handing over documents.

“In order to get an administrative subpoena, an agency needs to go to a federal magistrate. This is the employer’s opportunity to argue over what the subpoena should cover and what it shouldn’t include,” she said.

Both Merritt and Moseley expressed skepticism about voluntarily participating in E-Verify. While the process does permit the employer to check the information provided by workers, participation does not insulate the employer from liability.

“Taking part in Basic Pilot (the predecessor to E-Verify) didn’t help Swift,” Moseley said, referring to the raids of six Swift & Co. meat processing plants. Merritt said it is important to emphasize to employers that participating in E-Verify does not mean that the employer cannot be subject to a criminal or civil investigation.

Regulations

DOL Expected to Crackdown on Fraud, Increase Audits as PERM Program Evolves

NEW YORK—A new Labor Department regulation relating to fees for filing permanent labor certification applications could lead to a crackdown on alleged fraud by attorneys in immigration cases, a panel of attorneys said Oct. 9 during a session of the Practising Law Institute’s immigration and naturalization conference.

The rule, which became final July 16, says that employers must pay all the fees related to the process of permanent labor certification, referred to as PERM, and that employers cannot recoup the costs for the application process, even if the employee leaves the company.

According to Los Angeles-based attorney Catherine L. Haight, the new rule provides an opportunity for DOL to “get tough” on enforcing immigration laws and the risks are high for employers and attorneys.

“There’s little doubt DOL is going to enforce this provision,” said Haight, of the Law Office of Catherine Haight. “They are taking this rule very seriously and are willing to consider any attempt to get around the rule as fraud.”

Haight pointed to provisions in the rule that threaten debarment from the PERM process and even criminal sanctions—including imprisonment—for participating in fraud and said that it is important for employers and attorneys to be careful while completing PERM applications.

New Rule Could Result in Fewer Sponsorships. Joining Haight in expressing concerns about DOL’s intentions to enforce this rule, attorney Cynthia Juarez Lange said that the department is likely to seek out employers and attorneys to investigate in order to show it was serious about making the PERM process accountable.

“They have to find some attorneys and bad employers,” said Lange of Fragomen, Del Rey, Bernsen & Loewy in Santa Clara, Calif. “There are suspicions in Washington about the PERM process being too generous, so DOL will need to show it is keeping an eye on things.”

Lange lamented the change in the rule on compensation, suggesting that employers would sponsor fewer workers because they would be expected to pay for the full costs of the DOL portion of the process.

More Audits Expected. Another area where DOL is expected to step up its enforcement is in challenging PERM applications through more audits, explained attorney Romy Kapoor of Kapoor & Associates in Atlanta.

According to Kapoor, very few audits occurred in the past when employers filed permanent labor certification applications and those mostly involved the justification for a foreign language. But as DOL has worked to improve the process and implement PERM, Kapoor said he expects many more DOL audits asking questions about the rationale used on the applications.

Under the PERM process, an employer submits a permanent labor certification application asking to bring a skilled worker into the United States. On the application, an employer must show it has attempted to locate U.S. workers and explain why the specific employee being requested has the skills and background to fill the job. Once an application has been filed, it can be approved or rejected. It also can be “audited,” which involves DOL asking more in-depth questions and documentation.

“It is in the best interest of everybody that this process be seen as one that has integrity and that the immigration system isn’t being ‘gamed,’” Kapoor said. “It is part of the environment we are facing now.”

Haight agreed.

“DOL is chomping at the bit to do audits,” she said. “We need to be prepared and have our files ready so that we can help prove the certification is necessary.”

DOL Improvements. Despite raising concerns about DOL’s enforcement efforts, both Kapoor and Haight—who serve as liaisons with DOL on behalf of the American Immigration Lawyers Association—said they were impressed by the new PERM process and DOL’s commitment to resolving the backlog of cases.

Haight pointed to DOL’s recent announcement that it had eliminated the backlog of PERM applications, an achievement that she said most immigration attorneys and employers had thought might never happen given a history of serious problems in the labor certification process.

“I almost feel embarrassed complaining about a three-month wait, given what we used to have to deal with,” added Kapoor. He said some certifications have been resolved in as few as four days and that waits of four months are now considered unusual. In the past, he said it could take years to complete the certification process.