

Enforcement ramps up

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In 1986, Congress passed the Immigration Reform and Control Act. The purpose of this legislation was to address the growing problem of the hiring of illegal aliens. The IRCA required employers for the first time to determine the employment eligibility of all prospective employees hired after Nov. 6, 1986, and introduced U. S. employers to Form I-9. Enforcement of the IRCA was delegated to the Immigration and Naturalization Service, which relied primarily upon voluntary compliance and the imposition of civil administrative fines for employers who hired illegal aliens.

Twenty years, and millions of illegal aliens later, Congress is now debating many of the same issues that it confronted in 1986 and is considering substantial changes in the country's immigration and workforce policies. The Department of Homeland Security, acting through U.S. Immigration and Customs Enforcement, is not waiting for Congressional action, however, and is already pursuing policy initiatives that will have a substantial impact on many U.S. employers.

On June 16, ICE reaffirmed that it "is significantly enhancing its worksite enforcement efforts as part of its interior enforcement strategy." Abandoning the former INS approach of pursuing civil administrative fines against employers that violate the law, ICE is now bringing criminal prosecutions and using asset forfeitures to enforce the nation's immigration laws. It is unlikely that ICE will change this strategy soon, and the outcome of the congressional debate could result in even tougher enforcement.

The new "get tough" ICE strategy is evident in the enforcement action brought by ICE against Wal-Mart, which resulted in a \$15 million settlement by Wal-Mart and certain of its contractors in lieu of asset forfeiture. ICE raided Wal-Mart's corporate headquarters and 60 of its stores and arrested more than 250 employees of Wal-Mart's contractors. Even though an employer is not required under the law to verify the employment eligibility of the employees of its independent contractors, ICE alleged that Wal-Mart had direct knowledge of the hiring practices of its independent contractors and that it could not rely on the independent contractor exemption.

More recently, after a two-year investigation, ICE arrested four supervisors and 76 illegal alien employees at construction sites of Fischer Homes, a leading homebuilder in Indiana, Kentucky and Ohio. As in the Wal-Mart case, Fischer Homes was not permitted by ICE to rely on the independent contractor exemption, and its four supervisors were charged in a criminal complaint with aiding and abetting, and harboring illegal aliens for commercial advantage or private financial gain. Several contractors and contract companies that provided illegal workers to Fischer Homes are now also facing criminal charges. With one study estimating that 14 percent of the U.S. construction workforce is now comprised of ineligible workers, more ICE enforcement actions in the construction industry are sure to follow.

ICE has made crystal clear that it will look suspiciously at a claim by an employer that it did not know that its subcontractors were not complying with the law if the facts in the field or at the worksite indicate otherwise. What steps can a general contractor take to reduce the risk of a meltdown with ICE?

First, the employer can make sure that its employment policies and records are in order. ICE has published a list of "Best Hiring Practices" which, if followed by an employer, will substantially reduce the risk of hiring illegal aliens. An employer can also consider taking advantage of the ICE basic pilot program for determining electronically through federal databases whether an employee is eligible for hiring.

Second, the employer can require its subcontractors through properly drafted subcontract clauses to:

- Represent and warrant compliance with IRCA and collect and maintain all required I-9 information;
- Implement a meaningful IRCA records retention policy;
- Provide notice to the employer of any ICE enforcement action or worksite raid;
- Provide copies of I-9 forms and records for subcontractor employees stationed at the employer's worksite;
- Indemnify the employer for any costs, damages, expenses or fines incurred by the employer as a result of the subcontractor's employment of illegal aliens;
- Agree that failure to comply with IRCA and its employment eligibility verification laws is an event of default and a basis of contract termination.

To avoid unpleasant encounters with ICE, first put your house in order and develop meaningful policies for compliance with federal immigration laws and regulations. Second, challenge and require your subcontractors through properly written subcontract clauses to comply with IRCA rules and regulations.

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