

EMPLOYERS TAKE NOTICE WORKSITE ENFORCEMENT IS AN “ICE” TOP PRIORITY

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) which for the first time made employers active participants in a comprehensive system to eliminate employment as a “magnet” that attracts individuals to come to and reside in the United States illegally. Under IRCA, all employers are required to verify the identity and work authorization of all individuals hired after November 6, 1986. This requirement is implemented through the completion and execution of Section 1 of Form I-9 by the employee, submission to the employer by the employee of acceptable I-9 identity and employment eligibility documents and the review and verification of these documents by the employer as documented on Section 2 of Form I-9.

Employers who fail to properly complete the required I-9 documentation face a maximum civil fine of \$1,100 per employee while those found to have knowingly hired and continued to employ an unauthorized worker could pay a civil fine of up to \$3,200 per employee for a first time offense and a civil fine of up to \$16,000 per employee if an employer has more than two offenses. Moreover, if an employer engages in a pattern and practice of failing to comply with IRCA’s employer sanctions provisions, such criminal conduct could result in criminal fines of \$3,000 per unauthorized employee and a prison term of not more than six months.

Responsibility for enforcement of the employment eligibility verification program created by IRCA was vested initially in the Immigration and Naturalization Service (INS). The principal focus of this agency was on educating employers regarding their obligations under this law and seeking their compliance with such obligations. Those enforcement initiatives undertaken by INS, more often than not resulted in settlements with negotiated fines and the employer’s agreement to comply in the future. However, since the creation in March 2003 of U.S. Immigration and Customs Enforcement (ICE), the largest investigative branch of Department of Homeland Security (DHS), this agency has been responsible for enforcement of the penalty provisions of IRCA and for other immigration enforcement within the United States.

ICE has made enforcement of the country’s immigration laws, including worksite enforcement, a top priority, mounting what it describes as a “nationwide effort to shut down the employment magnet fueling illegal immigration.” Rather than administrative fines, which were viewed as an ineffective deterrent, this new strategy focuses on criminal enforcement. Julie Myers, Assistant Secretary of ICE, explains ICE’s rationale for this new approach as follows: “Criminally charging employers who hire undocumented aliens will create the kind of deterrence that previous enforcement efforts did not generate. We are also identifying and seizing the assets that employers derive from knowingly employing illegal workers, in order to remove the financial incentive to hire unauthorized workers and to pay them substandard wages.” ICE is directing its worksite enforcement efforts at worksites related to critical infrastructure and national security

such as airports, nuclear power plants, chemical plants, military bases, defense facilities and seaports, as well as all sectors of the economy that employ unskilled and semi-skilled workers such as restaurant workers, retail clerks, construction trades people, manufacturing line workers, hotel service workers, food production workers, landscape workers, and health care aids. As part of these efforts, ICE is carrying out raids on employers throughout the United States including, by way of example, a raid on AgriProcessors Inc. in Postville, Iowa where 306 people were arrested; a raid on a French restaurant in San Diego where 18 persons were arrested and the filing of criminal indictments against a car wash franchise and five members of its management charging them with conspiring to steal identities and using these identities to employ and harbor illegal aliens. Many such enforcement actions have resulted in the indictments of company executives, owners and managers on felony charges for harboring illegal aliens, money laundering, and/or knowingly hiring illegal aliens. The results of ICE’s dramatically-enhanced worksite enforcement efforts are very telling. In fiscal year 2007, ICE secured more than \$30 million in criminal fines, restitutions, and civil judgments in worksite enforcement cases. It arrested 863 people in criminal cases and made more than 4,000 administrative arrests, which is a tenfold increase over 2002 figures.

In the face of ICE’s increasingly aggressive worksite enforcement action, all employers, particularly those engaged in business sectors that involve critical infrastructure, national security, or employ large numbers of unskilled or semi-skilled workers should take steps to prepare for a possible, unannounced visit by agents of ICE. Such steps should include establishing clear and consistently applied policies on: (i) avoiding the hiring of any employees without authorization to work for the employer; (ii) termination of employees who are found to be without authorization to work or to be out of legal status; (iii) I-9 compliance including timely completion of Form I-9s; (iv) avoiding national origin and citizenship discrimination; and (v) dealing with the receipt of a “No-Match” letter from the Social Security Administration (SSA) or notice of discrepancy from DHS.

Employers also should carefully consider whether to voluntarily join DHS’s E-Verify program. It is a free Internet-based electronic employment eligibility verification system which employers can use to confirm that newly hired employees are authorized to work in the United States. The system compares social security number data and information in DHS’ immigration databases to the employee’s name and other Form I-9 information to confirm that the employee’s information matches that in government databases. If the data and information being compared does not match, USCIS notifies the employer of the non-confirmation. If a worker shows up as “employment authorized” the employer records the system-generated verification number on the Form I-9 or prints out the confirmation and attaches it to the I-9. On the other hand, if an employer gets a “tentative non-confirmation,” the employer must promptly provide the employee with information about how to challenge the information mismatch and the employee can then contest the determination and resolve the mismatch with the SSA or the DHS. Should the employee choose not to contest the finding, the determination is considered final and the employer may terminate the employee and resolve the case. If the employee elects to contest the tentative non-confirmation, the employee will have eight federal work days to resolve the issue. The employee may continue to work while the case is being resolved.

Participating in E-Verify, on its face, may seem a simple, straightforward decision for an employer to make to help ensure that newly-hired employees are authorized to work in the United States. However, there are obligations that an employer accepts when joining this

program that should be taken into account in the decision-making process. Specifically, in order to participate in E-Verify, an employer must register online at the DHS E-Verify page and accept the electronic Memorandum of Understanding (MOU) that details the responsibilities of the Social Security Administration, Department of Homeland Security and the employer. By joining the E-Verify program, including signing the MOU, an employer agrees, among other things, to notify DHS of any employee the employer continues to employ after a final nonconfirmation and thereby face fines of between \$500 and \$1000 in each such case. The employer also gives permission to DHS and SSA officials to visit the employer’s worksites to review E-Verify and related records (Forms I-9, SSA transaction records, DHS verification records as well as other related employment records) and to interview the employer’s authorized agents or designees regarding the employer’s experience with E-Verify for the purpose of evaluating E-Verify. Moreover, it is important to keep in mind that the granting of such permission may constitute a waiver of 4th Amendment protections.

On the other hand, by participating in E-Verify, the employer is presumed not to have violated the employer sanctions rules of IRCA with respect to the hiring of any individual if it obtains confirmation of the individual’s identity and employment eligibility in compliance with the terms and conditions of E-Verify. However, DHS does not consider using E-Verify to provide an employer with a “safe harbor” from worksite enforcement. Nonetheless, the fact that the employer used “E-Verify” to verify electronically the employment eligibility of its newly hired employees may have a positive impact on the outcome of any enforcement action taken including the likely avoidance of criminal penalties. If, however, an employer continues to employ a new hire after receiving a final non-confirmation, there is a rebuttable presumption that the employer is knowingly employing someone who is ineligible to work. In addition, because E-Verify can only be used for those hired after an employer enrolls in this program, any protections only apply to those new hires that were queried under the E-Verify system.

Despite the obvious concerns that an employer joining E-Verify may have regarding the access it has granted DHS to its relevant employment records, there are recent developments that may move at least some employers in the direction of participating in the program. First, President Bush issued an Executive Order on June 6, 2008 that requires federal contractors as a condition of each future federal contract to agree to use E-Verify to verify the employment eligibility of all persons hired during the contract term and all persons performing work within the United States on the federal contract. DHS has indicated its intention to implement this Executive Order as soon as possible. Similarly, some states have passed laws that, among other things, require all companies employing persons within such states and/or contracting with such states or local entities to register and use the E-Verify program. Finally, the USCIS has issued a new rule that permits students with degrees in the fields of science, technology, engineering and mathematics (STEM) to extend their optional practical training time (usually 12 months) by 17 months enabling such students to continue their employment in the U.S. and to have two additional opportunities to be selected for the H-1B annual lottery. However, for a student to be eligible for such an extension, his or her employer has to be participating in E-Verify.

For employers involved in business sectors targeted by ICE, time is running out. They need to put their “employer sanctions” houses in order before ICE initiates an enforcement action against them.