

INSIGHT: Is Your Company Prepared for Immigration-Related Worksite Enforcement?

By Elizabeth Espín Stern and Dan Stein

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ICE quadrupled its worksite immigration enforcement actions in fiscal 2018 and no employer is immune from the increased scrutiny on immigration compliance. Mayer Brown attorneys offer five questions to help employers assess their risk.

The Trump administration has made immigration enforcement an important priority of the federal government.

According to recent statistics from the U.S. Immigration and Customs Enforcement, ICE quadrupled its audits of worksites for immigration-related compliance in fiscal 2018, setting 10-year highs for the number of worksite audits conducted (5,981) and criminal charges filed (779). Among the 779 criminal charges filed, 72 employer managers were charged with criminal violations.

This employer-focused enforcement climate has prompted a number of high profile raids, especially in industries that require low-skilled or manual labor, such as hotels and other hospitality companies, chain retail stores, and restaurants, food processors, construction and landscaping companies, and agricultural facilities.

Recent ICE activities include a nationwide coordinated raid of convenience stores that led to 21 arrests, and a raid of a North Carolina manufacturing plant that resulted in the detention of 30 people.

The highly politicized nature of immigration enforcement—and its potential for negative reputational impact—was featured in a recent *Washington Post* report detailing the allegedly questionable employment practices of businesses owned by President Donald Trump and run by his family.

The recent coverage signals that no employer is immune from the increased scrutiny on immigration compliance and underscores the importance of aligning hiring and employment practices with statutory requirements for verification of identity and work authorization of new hires.

Preparedness for aggressive investigations and worksite enforcement requires a detailed understanding of civil and criminal enforcement standards and regulations, as well as an investment in internal investigations and crisis management.

Validating Work Authorization

The obligation of employers to validate work authorization and identity is complicated by the large volume of unauthorized workers and the prevalence of suspect documents.

Since 2003, ICE has been responsible for enforcement of the prohibitions on unauthorized employment in Section 274A of the Immigration and Nationality Act (INA). To guard against unauthorized employment, the law requires employers to use the Employment Eligibility Verification Form (Form I-9) to verify the identity and employment eligibility of all individuals hired in the United States after Nov. 6, 1986.

Compliance with the requirements for validation can pose challenges for some employers, particularly those in industries that have no centralized onboarding process—for example, those that allow walk-in applications across sites, and that may not have the luxury of a dedicated human resources professional at each location to complete the Form I-9.

Even more challenging is the prevalence of workers using false identification or “borrowing” the legitimate identification of another person. According to the Pew Research Center, there were 10.7 million unauthorized immigrants in the United States in 2016. Some 7.8 million of those unauthorized immigrants were estimated to be in the U.S. civilian workforce.

Dilemma for Employers

Employers that are overly aggressive run the risk of violating anti-discrimination rules, while employers who are insufficiently vigilant are vulnerable to investigation or prosecution.

The INA prohibits employers from discriminating against individuals based on their citizenship or immigration status, or based on their national origin, in the employment eligibility verification process.

While employers must verify the identity and employment eligibility of employees, employers may not:

- request more or different documents than are acceptable;
- reject documents that reasonably appear to be genuine and relate to the employee; and
- request specific documents over others based on an employee’s citizenship, immigration status, or national origin.

The government will apply a reasonableness standard to the employer’s verification of identity and employment eligibility. Employers cannot, for instance, accept documents for purposes of employment eligibility verification that are clearly fraudulent or do not relate to the employee.

A lack of reasonable diligence in verifying employment eligibility may leave an employer vulnerable to scrutiny from ICE, and ultimately prosecution.

Five Key Questions to Assess Your Risk Profile

1. Do you operate in an industry that relies upon large numbers of low-skilled or manual workers?

- Recent raids of convenience store chains, restaurants, food processing facilities, and gardening and landscaping companies reveal a pattern of workplace enforcement that targets businesses with a low-skilled workforce.

2. Has your business conducted an independent, external audit of its workforce employment authorization verification practices in the past five years?

- In addition to regular internal audits conducted by employers of their verification records, the present environment demands external review by independent professionals with experience in identifying weaknesses in overall compliance practices, as well as potential liabilities related to violations of employment verification regulations.

3. Do you retain external counsel that has experience not only in immigration compliance but also in immigration-related investigations and crisis management?

- Expanding worksite enforcement by ICE and the U.S. Attorneys' Offices carries the potential for disrupting workforce continuity and hampering the ability of employers to continue to operate.
- Moreover, continuing to conduct business in the midst of a criminal investigation brings particular challenges. Consequently, businesses are well-advised to engage counsel possessing a deep knowledge of immigration compliance and investigatory matters. Businesses must be prepared to respond quickly to allegations of immigration violations and aggressive investigations by ICE, federal prosecutors, the Department of Justice's Immigration and Employee Rights Division, and related agencies.
- Experience working with enforcement agencies and federal prosecutors is critical to an employer's ability to withstand federal scrutiny of its employment practices.

4. Does your business have a standardized practice for the onboarding and retention of new workers? Do your practices vary by facility and location?

- In the current high-scrutiny environment, a failure to standardize routine events such as the recruitment and onboarding of new workers can place a business at significant risk. Employers should review human resources practices across worksite locations and business divisions to ensure that company-wide policies and practices align with workforce employment authorization verification requirements.

5. Has your company enrolled in the Department of Homeland Security's E-Verify program?

- E-Verify is a web-based system that allows enrolled employers to confirm the eligibility of their employees to work in the United States. E-Verify employers verify the identity and employment eligibility of newly hired employees by electronically matching information provided by employees with records available to the Social Security Administration and the DHS.
- While participation in the program remains generally voluntary, ICE considers enrollment to be a best practice and may, when combined with careful attention to the reality of identity theft, provide an employer with a measure of protection against allegations of violations of workforce employment authorization verification requirements.

All Face Scrutiny

No employer is immune from the scrutiny of federal immigration agencies. It is also clear that the DHS and the U.S. Attorneys' Offices are focused on identifying and prosecuting immigration compliance failures that rise to the level of criminal violations.

U.S. employers are well-advised to plan accordingly. For example, it is critically important that businesses review their human resources policies and practices across worksite locations and business divisions to ensure that they are aligned with workforce employment authorization verification requirements.

Prudent preparation includes periodic independent audits of work authorization (Form I-9 and E-Verify) compliance and the retention of qualified counsel with experience in immigration-related enforcement and crisis management as well as experience dealing with federal prosecutors.

Author Information

Elizabeth Espín Stern, a partner in Mayer Brown's Washington, D.C., office, leads the firm's Global Mobility & Migration practice, which forms part of the Employment & Benefits group.

Dan Stein is a partner in Mayer Brown's New York office and a member of the Litigation & Dispute Resolution practice. He leads the firm's global Regulatory & Investigations group and is a co-leader of the White Collar Defense & Compliance group.

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