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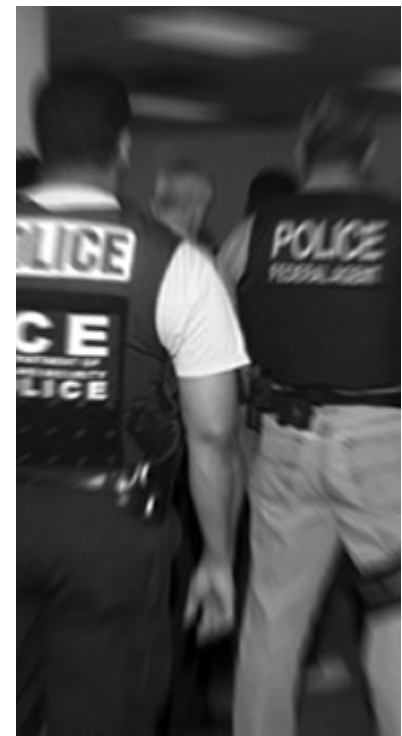
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EMPLOYERS BEWARE:

Department of Homeland Security announces refinements and a shift in priorities in its Worksite Enforcement Strategy

Following the Bellingham, Washington worksite raids in February 2009, the Department of Homeland Security's top appointee, Janet Napolitano, promised a full review of the enforcement action. Secretary Napolitano stated to lawmakers that she was not apprised of the raid in advance and that she "want[ed] to get to the bottom of this as well." For the last two months, DHS officials have reviewed current protocols and suggested improvements and changes to the prior administration's procedures.

On April 30, after a story appeared in *The New York Times* commenting on the review and revisions in policy, DHS issued a [press release](#) reiterating its continued commitment to enforcement and indicated that the new enforcement tactics would have a more targeted focus on employers rather than on unauthorized workers. DHS's release reminded the public that the agency has a vital responsibility to enforce the law, engage in effective worksite enforcement to reduce the demand for illegal employment, and protect employment opportunities for the nation's lawful workforce.¹ The press release also announced that "updated worksite enforcement guidance was distributed to [Immigration and Customs Enforcement \(ICE\)](#), which reflects a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers."² At



¹ See DHS, Press Fact Sheet, Worksite Enforcement Strategy, April 30, 2009

² Id

the same time, DHS acknowledged that unlawful workers would still be arrested if “found in the course of these worksite enforcement actions in a manner consistent with immigration law and DHS priorities.”³

The same morning that the press release was issued, the Special Agents in Charge (SAC) of each ICE office participated in a telephone conference with headquarters providing guidance and direction to “focus . . . resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration.”⁴ Insiders at ICE said the policy announcement was driven by those at the highest levels of the Department. Reaction from the business community was mixed, with some applauding the guidance as a step in reviewing enforcement priorities, some asking if this was a return to the ineffective paperwork review approach of the 1990s, and others questioning whether any real substantive changes were made to the previous administration’s policies and procedures as implemented under the leadership of former DHS Assistant Secretary Julie Myers. Most agree, however, that regardless of what the policy shift meant, enforcement still needs to be part of a comprehensive immigration reform strategy that addresses the 12 to 18 million undocumented individuals already in the United States and *then* punishes the “bad faith actor” employers that seek to take advantage of these workers.

The actual guideline document has not been released to the public as it includes sensitive law enforcement information. Fortunately, GT has been able to discuss the particulars with various sources in an effort to provide an overview and guidance to our clients. The policy announces a subtle shift in priorities with non-compliant employers clearly marked as ICE’s number one target.

WHAT IS THE NEW POLICY?

According to the DHS fact sheet, the worksite enforcement guidance “reflects a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country’s laws and knowingly hiring illegal workers.”

- **Control and comprehensive plan required**

What is clear is that ICE headquarters intends to exert much stronger control over the operations of its field offices. Agents were instructed to *continue* to adhere to the worksite reporting requirements, which include providing a 14-day notice to ICE headquarters in advance of developing or executing enforcement activity. This is part of an overall effort to ensure that action is taken only when there is a comprehensive plan for

³ Id

⁴ Id

prosecution of employers. Such a review seems to encourage a well thought-out action plan requiring the field offices to ensure the operation is well-organized and likely to succeed, prior to execution.

- *Priorities for those involved in Interior enforcement*

The field guidance discusses the purpose and priorities of worksite enforcement. As noted in the DHS press release and recent news articles, DHS is reconfirming the “employment magnet” as one of the primary problems leading to continued illegal immigration. The press release points out the prior administration’s record as a clear indication that the focus has to be shifted to make enforcement measures more effective. In particular, DHS noted that of the more than 6,000 arrests related to worksite enforcement in 2008, only 135 were arrests of employers. Prosecution and review of employers is now clearly a priority for ICE and the field offices are now mandated to shift resources in an effort to support this endeavor.

Agents around the country now understand their worksite specific mission to be:

- penalize employers who knowingly hire unauthorized workers
- deter employers who are tempted to hire unauthorized workers
- encourage employers to utilize compliance tools and conduct internal clean ups of their workforces

While criminal prosecution of employers is crucial to the new plan, headquarters notes that the Agency will continue to fulfill its responsibility to arrest, process and remove illegal workers encountered during worksite enforcement operations, but with greater humanitarian protections.

- *Change to humanitarian policy*

A specific change to current policy enumerated in the guidance includes an amendment to the existing humanitarian guidelines. The protections currently in place for worksite enforcement actions involving 150 or more unauthorized workers have now been reduced to a lower threshold of 25. These protections include contacting the Department of Health and Human Services’ Division of Immigration Health Services (DIHS) to provide personnel to attend to those being taken into custody at a processing site. The goal is to ensure that the people being arrested or the detainees’ children are not placed at risk because of such an arrest. If DIHS is not available to coordinate with ICE, the policy instructs the agents to work with state and local social service agencies to provide support to the detainees. We applaud DHS for improving this policy.

WHOM WILL ICE TARGET?

The guidance suggests that ICE offices should look to prosecute employers after finding evidence of the mistreatment of workers, trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering and other violations. ICE will be focusing on employers -- including owners, hiring managers and line supervisors -- and using their tool box of investigative methods to create a comprehensive enforcement and prosecution plan. Employers involved in critical infrastructure and national security will remain favorite targets of ICE under the stated policy.

HOW WILL ICE TARGET THESE EMPLOYERS?

The mandate seems to require that ICE agents obtain a warrant, indictment or the blessing of a U.S. Attorney to prosecute the targeted employer *before* arresting employees for civil immigration violations at a worksite, but the new policy leaves the door open for other avenues if this is not possible. Considering the high threshold required for criminal warrants, this begs the question of whether ICE administrative warrants, and Blackie's warrants (federal civil search warrants issued by a United States Magistrate),⁵ will be used more or less frequently. The new policy is silent regarding administrative warrants, but does remind agents to utilize all available civil and administrative tools, including civil fines and [debarment from federal contracts](#), to penalize and deter employment of illegal immigrants.



- *The tool box*

Among the recommended tools are use of informants and cooperating witnesses, introduction of undercover agents, as well as consensual searches and Form I-9 audits. When standards for criminal cases cannot be met, ICE will now diligently move to the imposition of civil fines and other penalties. This means that employers will be experiencing the use of increased fines, discussed below. Employers can no longer ignore the Immigration and Reform and Control Act (IRCA) or view its successor I-9 civil penalties as "the cost of doing business." [Debarment proceedings](#), which prohibit a company from being a federal contractor, will also be routinely brought against companies that have knowingly hired unlawful workers.

⁵ *In Blackies Blackie's House of Beef, Inc. v. Leonel J. Castillo, Commissioner of the Immigration and Naturalization Service, et al., Appellants.nos. 79-1057 et al United States Court of Appeals, District of Columbia Circuit. - 659 F.2d 1211 the court decided the INS was not required to meet the same level of probable cause as is appropriate in the case of criminal warrant.*

- *Increased I-9 inspections*

Employers should be prepared for an enormous increase in government audits, with more Notices of Inspection (NOIs)⁶ to be issued to employers as a first step towards gathering evidence for a criminal case. This renewed emphasis on audits and inspections draws from the 1986 IRCA administrative civil penalty system. However, the last administration acknowledged the shortcomings of IRCA and moved to a more comprehensive approach of targeting the “bad faith actors.” In fact, the previous administration also acknowledged that civil fines were viewed as “just a ‘cost of doing business’” and therefore the system did not serve as a true economic inducement for employers to change their business model.⁷ The recent announcement confirms that ICE will continue to move towards making the cost of noncompliance too expensive to ignore. Inspections will produce a review of an employer’s I-9 process; its training and procedures will also be reviewed by the agents.

When criminal actions are not available, the field agents are advised to impose civil fines and other penalties. It is also important to remember there is no double jeopardy, where appropriate ICE can pursue both criminal sanctions and administrative fines. Thus, the I-9 inspection and other administrative tools outlined above are an important part of ICE’s overall strategy.

WHAT SHOULD EMPLOYERS BE DOING?

Employers should be proactive and conduct voluntary, in-house audits to assess the state of their company’s I-9s, correct errors, and ensure proper compliance with immigration regulations. Often we find that many of our clients’ I-9 practices need to be updated, which then provides an excellent opportunity for employers to develop and implement an ongoing training program and to formalize recordkeeping procedures. Both small and large companies alike should consider the following additional best practices when developing a comprehensive immigration compliance policy:

- diligently verify the identity of their job applicants;
- consider use of the E-Verify system - after careful consultation with an attorney;
- establish protocols for responding to “death and infant” Social Security No-Match letters;
- establish and maintain safeguards against use of the I-9 process for unlawful discrimination; and
- create a protocol for assessing contractors and subcontractors.

⁶ The Notice of Inspections issued by ICE generally requests a company to make available for inspection the I-9 Forms for each eligible employee. The NOI generally will also request a list of all active employees. The NOI will also request a list of employees for which the employer is required to maintain I-9s under the retention schedule. Generally a company is provided with three (3) business days advance notice of the I-9 inspection as required by law. Other documents, including payroll, quarterly tax filings and I-9 compliance policy information may also need to be provided.

⁷ See, *Statement of Julie L. Myers, Assistant Secretary U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security before the U.S. House Of Representatives Committee on Ways and Means Longworth House Office Building July 26, 2006.*

As described above, ICE is utilizing various tools to target employers, particularly those in industries involved with vital infrastructure and national security, as well as the usual suspects comprising “targeted” industries. Employers must take steps *now* to ensure they are in full compliance or face serious consequences. Actions taken *before* a government audit or investigation is initiated generally help mitigate damages, reduce exposure and save the company both time and money in the long run.

Greenberg Traurig’s Business Immigration and Compliance Group has extensive experience in advising multinational corporations on a variety of employment related issues, particularly I-9 employment eligibility verification matters audits and minimization of exposure and liabilities. In addition to assisting in H-1b and Labor Condition Application audits, GT develops immigration related compliance strategies and programs, and performs internal I-9 compliance reviews. GT has successfully defended businesses involving large-scale government worksite enforcement actions. GT attorneys provide counsel on a variety of I-9 issues including penalties for failure to act in accordance with government regulations, IRCA anti-discrimination laws and employers’ responsibilities upon receiving “No-Match” letters.

This *GT Alert* was written by [Dawn M. Lurie](#). Questions about this information can be directed to Ms. Lurie (luried@gtlaw.com; 703.903.7527) or to your immigration professional list below.

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