



General Contractor Liability Under An Era Of Increased Worksite Enforcement

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Efforts by the Department of Homeland Security ("DHS") and U.S. Immigration and Customs Enforcement ("ICE") to enforce the nation's immigration laws have specifically targeted employers in recent years, forcing the nation's businesses to make immigration compliance a top priority. The most highly publicized aspect of this enforcement have been raids on workplaces nationwide, which have targeted businesses in all geographic regions and in every type of industry. ICE reports that during fiscal year 2007, it "dramatically increased penalties against employers whose hiring processes violated the law, securing fines and judgments of more than \$30 million while making 863 criminal arrests and 4,077 administrative arrests." ICE also reports that during the last few years, "the number of criminal and administrative arrests has steadily increased. Those arrested criminally include a variety of persons – corporate officers, employers, managers, contractors, and facilitators." For example, IFCO Systems, a manufacturer of wood pallets, recently agreed to pay \$20.7 million in immigration-related civil forfeitures and penalties, and several company managers pled guilty to knowingly employing illegal workers at its plants.

ICE has acknowledged that some industries are specifically targeted for workplace enforcement, generally because they are viewed as employing a significant number of unauthorized workers. These industries include construction, agriculture, hospitality, food processing and textiles. Contractors in these industries must take action to reduce the risk of ICE investigation. Statements from the current administration in Washington suggest that these workplace enforcement measures will continue and may even increase.

I. OVERVIEW OF REQUIREMENTS

General contractors are especially vulnerable to violations of federal immigration law due to the difficulty of verifying the work authorization of a subcontractor's employees. Moreover, all employers risk prosecution by DHS for failing to comply with the Immigration Reform and Control Act of 1986 (IRCA), which requires employers to complete a Form I-9 for any employee hired after 1986, to verify the employee's identity and work authorization. At the same time, employers must balance this requirement with adherence to the anti-discrimination provisions, which prohibit the employer from requesting specific documents to complete the I-9, or from treating employees of a certain ethnic identity differently from others. Employers also must not request more documents than are necessary to complete the I-9 form. This is called "overdocumenting," and it can result in the employer being fined. If an employee presents a document that facially appears to be genuine, an employer is required to accept the document under IRCA.

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A contractor violates IRCA when it fails to complete the I-9 form properly, which may signal that the contractor has employed an individual whom it knows lacks authorization to work in the U.S. A contractor who has properly completed an I-9 form is protected by the **good-faith compliance** defense, and will have a basis for arguing that it did not know that the employee actually lacked authorization to work.

Federal law does not impose a duty on a party to verify the employment eligibility of an independent contractor. However, a party is prohibited from contracting or otherwise agreeing with another party to obtain the labor of a person *knowing* that the person is not authorized to work in the U.S.

The law was not intended to create a "zero tolerance" policy for a contractor's unknowing, unintentional employment of unauthorized workers. Moreover, the legislative history of IRCA makes clear that contractor's are not automatically liable for the actions of independent contractors with whom they may do business. Under the federal law, a rebuttable presumption is established when any employer has acted in "good faith" that it has satisfied IRCA's basic I-9 requirements.

II. AVOIDING CO-EMPLOYMENT ISSUES WITH SUBCONTRACTORS

General contractors should avoid creating a co-employment relationship with a subcontractor, because this may cause the general contractor to be held liable for the subcontractor's failure to comply with federal immigration and other employment laws. To avoid co-employment issues with a subcontractor, general contractors should do the following:

1. Don't retain too much control: Generally, a contractor is not liable for the actions of its subcontractor, except when a contractor retains control over the subcontractor. In situations where the general contractor retains control over the subcontractor's work, one must be careful to not create an employer-employee relationship or co-employer relationship, in place of the contractor-subcontractor relationship.
2. Don't review subcontractor's I-9 forms. Every employer is responsible for completing I-9 forms for its own employees. General contractors are not responsible for ensuring that its subcontractor's I-9 forms are complete. However, all contractor agreements should include a provision requiring that its subcontractors properly complete I-9 forms for all employees.
3. Don't use a subcontractor with a questionable reputation: Contractors must be prudent when selecting subcontractors. Don't select subcontractors whom you suspect employ illegal immigrants.
4. Don't continue to use a subcontractor if you know the contractor employs illegal immigrants: Under IRCA, a contractor who knows its subcontractor is employing illegal immigrants will be treated the same as a contractor who actually employed unauthorized workers itself.

III. TRIGGERS THAT REQUIRE A GENERAL CONTRACTOR TO TAKE ACTION

General contractors are required to actively investigate whether its subcontractor's employees are eligible to work, if the following events occur:

- ICE Investigation of contractor or subcontractor;
- Credible tip that subcontractor is employing illegal immigrants;
- Credible tip that a specific employee is not authorized to work;
- Employee requests immigration sponsorship; or
- Identity theft accusations regarding an employee.

If any of those events occur, a general contractor should consider the following actions:

- Seek advice from immigration counsel;
- Investigate subcontractor's I-9 compliance policy;
- Review contractor agreements to determine whether the contractor is shielded from potential liability;
- Request that the employee in question not be permitted to work on contractor's project; or
- Terminate subcontractor relationship, if contractor cannot confirm that subcontractor's workforce is legal.

IV. CREATING A PREEMPTIVE COMPLIANCE POLICY

As ICE continues to conduct raids or investigations including I-9 audits, contractors need to preemptively create an effective and comprehensive compliance policy.

In order to ensure I-9 compliance, a general contractor should consider implementing the following:

1. Contractor Agreements: General contractors should include language in all contractor agreements requiring that subcontractors comply with federal immigration laws. The agreement should also include an indemnity provision and a requirement of immediate removal of workers known to be unauthorized workers. It is necessary for general contractors to take these precautions to protect themselves from liability.
1. Audits: Contractors should periodically conduct self-audits of their I-9 forms to ensure they are properly completed. During the self-audit, the contractor can insert any missing information and if necessary contact the employee to obtain missing information or to re-examine a document presented by the employee. In addition to self-audits, contractors should seek immigration counsel to provide a complete I-9 compliance review.
1. Written I-9 Compliance Policy and Training: Contractors should create a written I-9 Compliance policy, which can be used as further evidence of the contractor's standing policy to comply with federal immigration laws. The immigration policy should include specific procedures for completing the I-9 form and steps the company will take if an employee's work eligibility is

questioned. Contractors should also provide training for its employees regarding the immigration policy to ensure that it is implemented properly.

1. **Raid Action Plan:** Contractors should establish a Raid Action Plan. The Raid Action Plan should provide guidelines to employees regarding proper steps to take if an ICE officer visits the worksite or if there is a large-scale raid by ICE agents. The Raid Action Plan should: establish a chain of command, prohibit employees from speaking with ICE before speaking with the company's attorney, and designate an individual who is authorized to speak with ICE agents.
1. **Electronic I-9 Form and Employment Verification Systems:** Fortunately for employers, there are web-based employment verification systems and electronic I-9 storage products available to contractors. For example, E-Verify is a government-run web database that allows participating employers to electronically verify the employment eligibility of newly hired employees. Use of E-Verify does not provide a "safe harbor" from worksite enforcement and in some cases may even trigger scrutiny of an employer by federal officials. Although some state and federal contractors are required to use E-Verify, many employers have decided not to use E-Verify, unless required, because the system has been criticized as generating 3-4% of inaccurate results as well as additional company resources in using the system. *A contractor considering using E-Verify should consult with an attorney to discuss whether the costs outweigh the benefits.* There are also electronic I-9 storage products, such as the Fisher Phillips Electronic I-9 Solution, that allow contractors to accurately enter and store I-9 information electronically.

Enforcement under the new administration is expected to continue, given ICE's stated priority of targeting businesses and industries that have traditionally employed illegal immigrants. Forms of investigation may include a range of worksite enforcement methods from raids, I-9 audits, and arrests for specific workers under investigation for fraud or criminal law violations such as identity-theft.

It is therefore imperative that general contractors in the construction industry comply with I-9 laws, while simultaneously taking steps to shield themselves from any liability caused by their subcontractors' failure to comply with federal immigration laws.