New California Law Imposes Obligations on Employers During Immigration Worksite Enforcement

Insights
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On October 5, Governor Brown signed AB 450, which will go into effect on January 1, 2018. Among other things, AB 450 prohibits employers from voluntary consenting to ICE access to the worksite without a judicial warrant, requires employers to provide their workers with notice of certain immigration enforcement actions, and imposes new statutory penalties for violations of the law.

Since the election of President Trump, the California Legislature has been vocal and active in efforts to resist announced or anticipated actions of the Trump administration. This includes efforts to make California a "sanctuary state," measures to protect California's environmental standards, legislative resolutions and statements against the travel ban and other Trump proposals, expressions of support for the DACA program, and other actions to provide services and support to immigrants in California.

It was anticipated the Legislature would similarly respond in some fashion to address issues impacting immigrant workers. This is not new. In the last few years, the California Legislature has enacted a number of laws designed to protect immigrant workers – ranging from anti-retaliation measures to bills aimed at restricting the use of E-Verify or prohibiting specified "document discrimination."

This year, the Legislature's response came in the form of Assembly Bill 450 by Assemblymember David Chiu (D-San Francisco), a measure which was recently signed into law by Governor Brown.

The bill, jointly sponsored by the California Labor Federation and SEIU, is entitled the "Immigrant Worker Protection Act." In a statement accompanying introduction of the bill, the author stated:

"Trump's threats of massive deportations are spreading fear among California workers, families, and employers. AB 450 declares California's determination to protect our economy and the people who are working hard to contribute to our communities and raise their families in dignity. I'm proud to author this legislation which goes beyond California's existing defense of immigrants to offer new legal protections for individuals in our workplaces. At the same time, AB 450 offers employers clarity about what to do when ICE agents target their places of business with indiscriminate raids."

Employers Required to Demand Judicial Warrants and Subpoenas

Under current federal immigration law, when federal immigration authorities (or ICE) show up at a worksite to engage in enforcement activity, an employer may allow authorities to access non-public portions of the worksite by requiring a judicial warrant or voluntarily consenting to access.

AB 450 essentially removes the ability of employers to "voluntarily consent" to ICE access in this manner. Employers (or persons acting on behalf of employers) would be prohibited from providing voluntary consent for access, and instead would have to insist on a judicial warrant. However, the new law provides that it does not prohibit the employer from taking the immigration enforcement agent to a nonpublic area, where employees are not present, for the purposes of verifying the warrant.

An employer that violates this requirement is subject to a $2,000 to $5,000 civil penalty for a first violation, and $5,000 to $10,000 for each subsequent violation. However, the bill provides that enforcement of these penalties will be under the exclusive authority of the Labor Commissioner or the Attorney General, and any penalties recovered will be deposited in the Labor Enforcement and Compliance Fund. Therefore, (and since this provision in in the Government Code rather than the Labor Code), there will be no private enforcement under the Labor Code Private Attorneys General Act (PAGA).

Similarly, AB 450 prohibits an employer (or person acting on behalf of the employer) from granting voluntary access to the employer's employee records without a subpoena or judicial warrant. However, this does not apply to I-9 forms and other documents for which a Notice of Inspection has been provided to the employer. Similarly, an employer that violates this requirement is subject to a $2,000 to $5,000 civil penalty for a first violation, and $5,000 to $10,000 for each subsequent violation.

This puts California employers in the unenviable place of being stuck between state and federal law when it comes to immigration issues. Although immigration is an issue of federal law, with the enactment of AB 450 California has inserted itself (and the state's employers) squarely in the middle of this debate. In particular, California employers will have to train supervisors and front-line staff regarding how to respond when ICE shows up at the worksite, in light of these new restrictions. Many employers have expressed unease about being required to "stand up" to ICE in this manner, and have expressed concern about what ICE's potential reaction and response will be. Employers will have to train staff on how to tactfully react to these situations, or face stiff penalties under the new law.

Employers Must Provide Notice of Certain Worksite Immigration Enforcement Actions

The new law also imposes a number of new notification requirements on California employers.

First, employers must provide current employees with a notice of any inspection of I-9 forms or other employment records within 72 hours of receiving notice of the inspection. Written notice must also be provided to any collective bargaining representative within this same time frame. The Labor Commissioner is tasked with developing a template that employers may use by July 1, 2018.

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Second, upon reasonable request, an employer must provide an affected employee with a copy of a Notice of Inspection of I-9 forms.

Third, employers must provide affected employees (and their representative) a copy of the notice that provides the inspection results within 72 hours of receiving it, as well as written notice of the obligations of the employer and the affected employee arising from the results of the inspection. This notice shall be delivered by hand at the workplace if possible, or by mail and email if hand delivery is not possible.

An employer who fails to provide these required notices is subject to a $2,000 to $5,000 civil penalty for a first violation, and $5,000 to $10,000 for each subsequent violation, recoverable by the Labor Commissioner.

Re-Verification of Eligibility

AB 450 also prohibits an employer from re-verifying the employment eligibility of a current employee at a time or in a manner not required by federal law. The Labor Commissioner is authorized to recover civil penalties of up to $10,000 for violations.

What Should Employers Do Next?

AB 450 goes into effect on January 1, 2018. In the meantime, California employers should review their policies and procedures to verify compliance with the law. In particular, California employers should train supervisors and front-line staff on how to handle the law's new requirements with respect to judicial warrants and subpoenas. It may be prudent to have a documented policy in place on how to handle these situations when they arise. In addition, employers will have to pay close attention to the employee notification provisions of the bill, and make sure that they are providing any required notices within the applicable timelines.

For more information about this new law, please contact your regular Fisher Phillips attorney, or one of the attorneys in any of our California offices:

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