Homeland Security Steps Up Interior Enforcement And Threatens Criminal Sanctions

A SPECIAL ALERT FOR EMPLOYERS IN CONSTRUCTION, AGRICULTURE, HOSPITALITY, FOOD PROCESSING, AND TEXTILES

Insights
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Beginning about six weeks ago, the Department of Homeland Security (DHS) and its Bureau of Immigration and Customs Enforcement (ICE) suddenly focused upon interior enforcement of our immigration laws. This has resulted in highly publicized raids on employers, I-9 inspections, detention of deportable aliens, and lots of media coverage. Employers in some industries are more at risk for government investigation and sanctions than others simply because of the perception that those industries have historically employed aliens in relatively low-wage positions in our economy. These industries include construction, agriculture, hospitality, food processing, and textiles. Employers in these industries need to take immediate steps to reduce the risk of enforcement action.

Most alarming is DHS's stated intent of using criminal sanctions to stop "systemic violators" of our immigration laws. In two major raids in the last four weeks, DHS and ICE have arrested managers and accused them of harboring illegal aliens by virtue of continuing their employment. In the Fischer Homes case last week, the Company's job site superintendents were arrested apparently because they did not forbid a contractor from allowing its employees to work on the Company's job sites after an ICE agent told the superintendents that the workers were illegal. DHS and ICE assert that allowing a contractor's illegal workers to continue working constitutes harboring of illegal aliens. The penalty is 10 years in prison and/or $250,000 in fines per alien.

Separately, DHS has indicated that it will prosecute employers that ignore the Social Security Administration (SSA) mismatch letter on the theory that workers who show up on the mismatch list year after year must be illegal workers. Indeed, in the wake of the IFCO raids a month ago, DHS Secretary Michael Chertoff specifically stated that one piece of evidence leading to the arrest of 7 IFCO managers was the fact that the company had ignored the SSA mismatch letter for over 10 years and that over 50 percent of IFCO's workers showed up on the mismatch list.

Employers can take steps to avoid or reduce the risk of enforcement action.

- First, implement or re-issue policies confirming your compliance with U.S. immigration laws. This notice can be posted on every job site and where applicants apply for work.

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- Second, require contractors and subcontractors to certify compliance with immigration laws.
- Third, now is the time to make certain your I-9 forms are properly completed. Consider having an outside expert or consultant review your forms and follow their recommendations.
- Fourth, establish or implement a policy regarding visitors to your facilities. This policy should require that all visitors check in and that government visitors are referred to HR or Legal Counsel before being allowed access to property or employees.
- Fifth, consider using the SSA online verification system going forward. It's free and it will reduce the number of people on the SSA mismatch letter in the future.
- Sixth, for employers with substantial numbers of workers on the mismatch letter year after year, send those workers a notice that they need to try to resolve their problem at the local SSA office because you don't know what action you might have to take if they appear on the mismatch list again.

Finally, if you believe your I-9 compliance is very good and you can tolerate the possible loss of falsely documented workers, consider asking ICE to come review your I-9 forms.

This step should only be taken after consultation with competent counsel regarding your I-9 compliance. Naturally, there is a chance that ICE will accept your offer, but there is also a chance they will politely decline on the theory that you can't possibly be a systemic violator if you invite them to come audit you.

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