New Year Brings Major Changes To California Employers' Immigration Practices

FAQS REGARDING CALIFORNIA AB450 – THE IMMIGRANT WORKER PROTECTION ACT

Insights
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Soon after ringing in the New Year, California employers will need to spend the beginning of 2018 coming to grips with a significant new law that will require an immediate adjustment to immigration-related business practices. California Assembly Bill 450, also known as the Immigrant Worker Protection Act, will go into effect on January 1, 2018, bringing about strict new requirements for all employers in the state regarding the handling of a government audit or investigation of premises or employee records. The new law includes mandatory notice requirements and additional prohibitions against access to public workspaces that goes above and beyond what is required under federal law.

Here are the most frequently asked questions that will provide you with a good starting point on complying with the law. We suggest you contact any member of the Fisher Phillips Global Immigration Practice Group, or your regular Fisher Phillips attorney, to assist with compliance efforts.

When does AB450 go into effect?
Governor Brown signed AB450 on October 5, 2017, with an effective date of January 1, 2018.

Who does the law apply to?
Every public and private employer in California, or any person acting on the employer's behalf.

What is required or prohibited under AB450?
First and foremost, the law prohibits employers or their representatives from waiving their 4th Amendment protection from searches and seizures in certain immigration-related situations. Namely, you are not permitted to allow immigration enforcement agents to enter nonpublic workspaces without a judicial warrant, and you are similarly not permitted to provide employment records to immigration enforcement agents without a subpoena or judicial warrant.

Second, the law requires employers to give employees and their representatives notice of audits by Immigrations and Customs Enforcement, commonly known as ICE. Within 72 hours of receipt of a Notice of Inspection (NOI) from ICE, you must notify your employees and any applicable union. Upon reasonable request, you must also provide a copy of the NOI to any affected employee. Also, you

must provide the results of any inspection and obligations of the employer and affected employee(s) arising from the results of the inspection within 72 hours of receipt.

Third, the new law prohibits employers from re-verifying employment documentation of affected employees unless otherwise required to comply with the Immigration Reform and Control Act (IRCA) or E-Verify.

How do the requirements under AB450 differ from current law?
Current law permits you to allow an immigration enforcement agent (i.e., an ICE officer) to enter nonpublic workspaces and to provide them employment records upon request. Employers usually have a three-day notice period in which to provide employment records, but under current law they can waive this and submit documentation upon request. Moreover, current law does not require you to disclose to your workforce that an I-9 audit or investigation is underway, and also does not require you to disclose the result of any I-9 audit or investigation to any member of your workforce.

What are the notice requirements under AB450 to employees?
Within 72 hours of receiving a NOI, you must post notice at worksite in language normally used to communicate employment-related information to employees. The posted notice must inform your employees that an immigration agency has issued an NOI and will conduct inspections of I-9 forms or other employment records. You must identify which agency has issued the notice, provide the date that the NOI was received, and describe the nature of the inspection (to the extent known). If an affected employee makes a reasonable request, you must provide them with a copy of the NOI.

After receiving notice of any inspection results, you must provide current "affected employees" and their authorized representative(s) a copy of the results within 72 hours. You must also provide any written notice of the obligations of the employer and the affected employee arising from the action. The notice shall relate to the employee only, and shall be delivered by hand at the workplace if possible. If hand delivery is not possible, the notice should be delivered by mail and email. This notice must describe any and all deficiencies or other items identified in the inspection results that relate to the affected employee, state the time period for correcting any potential deficiencies, state the time and date of any meeting with employer to correct any identified deficiencies, and inform the employee of their right to representation during any meeting scheduled with you.

What are the notice requirements to any unions representing your workers?
Similarly, within 72 hours of receiving any NOI, you must give written notice to the "employee's authorized representative" – in other words, a union. Also, within 72 hours of receiving notice of the inspection results, you must provide current affected employees and their union a copy of the results along with a written notice of your obligations as well as the obligations of the affected employee arising from the action.

The written notice to the union must describe any and all deficiencies or other items identified in the inspection results that relate to the affected employee and provide a time period for correcting any potential deficiencies. You also must state the time and date of any meeting scheduled with your

potential deficiencies. You also must state the time and date of any meeting scheduled with your organization to correct any identified deficiencies, and inform the employee of their right to representation during any meeting scheduled with you.

What does AB450 say about re-verification of I-9s?
The new law prohibits you from re-verifying the employment eligibility of any current employee at a time or in a manner not required under IRCA or per E-Verify obligations. Remember: California law prohibits you from terminating the employment of a worker because they present you with new documentation for I-9 and work authorization eligibility, and E-Verify can only be used with new hires – no exceptions.

What are the penalties for violations of AB450?
The good news is that the California Labor Commissioner and the Attorney General have exclusive authority to enforce these provisions, so you will not be facing private lawsuits alleging violations of the new law. The bad news is that the penalties are quite stiff. The first violation could bring a fine between $2,000 and $5,000, while the second violation and each subsequent violation thereafter could bring fines between $5,000 and $10,000.

Moreover, the Labor Commission may recover up to a $10,000 penalty for each instance an employer re-verifies the employment eligibility of a current employee at a time or in a manner not required by federal law.

What are best practices employers can take to stay in compliance with both federal and state law?

- **Immigration Point Person:** You should start by immediately designating an "Immigration Point Person" in your organization. They will be responsible for communicating with any ICE officer who visits your workplace, and they should be the only person providing any information to ICE. Make sure that everyone in your organization, including office personnel, knows the identity of your Immigration Point Person. In the event you receive a NOI, this point person should immediately notify management and legal counsel.

- **Prepare For Office Visits:** You should next train your managers for the correct way to handle a visit from an ICE officer. If an ICE officer appears onsite, train your staff to ensure that the officer is kept in a public workspace. Make sure your representatives know that they should not bring them to the back offices or other nonpublic worksites. Have your Immigration Point Person talk with the officer to understand the specific nature of the request. Your point person should politely ask the officer if they have a NOI, subpoena, or a search warrant. If the officer has no such documentation, your point person should inform them that a search or document review will not be permitted.

- **Handling Lawful Search Warrants:** If the officer provides such a document, make sure your point person reviews it very carefully and immediately provides a copy to designated individuals – human resources staff, legal personal, management representatives – for their review. If the document is a search warrant, make sure your staff knows not to resist the lawful search

document is a search warrant, make sure your staff knows not to resist the lawful search. Instead, your point person should contact management and legal counsel immediately to make them aware.

- **Handling Subpoenas Or Notices Of Inspection:** But if the document is a subpoena or NOI, train your point person to inform the officer that your company requests at least three business days' notice before any inspection of paperwork can take place. Moreover, make sure your point person knows that NOI's and subpoenas do not permit ICE officers to talk with employees, and that you should refuse any request by the officer to speak with specific employees. During this window of time, you should comply with the new state law and provide the required notice to employees and employee representatives in the necessary timeframe. You should next prepare for the inspection or audit of your immigration practices, ensuring that you do not destroy or alter any I-9 documents.

- **Prepare For Audit:** Finally, select an appropriate location for the onsite audit, preferably a conference or meeting room where there will be no interruptions and limited access to employees. During the audit, have your point person take careful note of any alleged violations mentioned by the auditor. After the audit has been completed, your point person should ask the auditor for assistance in understanding any alleged problems.

If you have questions about this new law, contact any member of the Fisher Phillips Global Immigration Practice Group, or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People

Jocelyn Campanaro
Partner
303.218.3667
Email

Service Focus

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