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Briefly

September 2006 Volume 6, Issue 9

INSIDE INS

Anita Patel

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Over the last several months our firm has had many telephone calls and meetings with current and former officials of the Immigration and Naturalization Service (now Immigration and Customs Enforcement or ICE) dealing with the new enforcement policies and direction of the federal government. The conclusions about these policies and directions are the subject of this article, and represent the writer's opinion.

How INS Has Changed

First, it is quite hard to determine easily what ICE is doing for various reasons. Many of the former INS officials who were involved in immigration enforcement are now gone. For example, this writer dealt with six (6) INS officials at one regional office over the years, as recently as 6 years ago, and all of them are now gone. In their place are not only new officials, but also officials from other parts of the government as a result of government reorganizations and the organization of the Department of Homeland Security. For example, many former customs officials are now responsible for immigration enforcement, and are new on the job.

Second, functions of the government pertaining to immigration are divided among various departments and subgroups of the Department of Homeland Security, and the old adage applies, "The right hand doesn't know what the left hand is doing." For example, if you ask someone in ICE about how they set up the government pilot (SAVE) program, they will hand you a form and say that is handled by another department. You get the same answer in asking ICE about the new proposed regulation on Social Security and immigration registration mis-match numbers.

Third, there is great confusion and a flux in important decision making authority, as between the national office, the regional offices, and local offices. Historically, many important immigration enforcement decisions were made by local office personnel. However, under newer government plans, there is more effort being made to centralize the enforcement philosophy and decision-making in Washington. Further, much of the actual decision-making depends upon the relative experience of the immigration office in question. ICE officials that are new or inexperienced in immigration matters, are more likely to call a regional office for guidance.

How Targets Are Selected

Of particular interest to employers is the question of how targets are selected for investigation and/or prosecution. To a great extent, ICE enforcement officials rely on publicity, rumors, hot tips, and of course, informants and undercover agents to get their information and/or evidence for prosecution. For example, if a news account or other such information reveals something interesting about the large alien employment level at a particular plant or location, ICE may send someone to that location to investigate. ICE is particularly suspicious of an employer with a large proportion of alien employees, paying particularly low wages, in contrast to the relevant labor market in the area. In many cases, the person doing the investigation is an undercover agent, perhaps posing as an immigrant worker inquiring about how to acquire counterfeit documentation in order to gain employment at an employer. While ICE is looking for any company involvement and/or knowledge of the illegal counterfeiting activity, ICE will also pursue individual actions against the counterfeiting persons.

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KNOW YOUR ATTORNEY

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MARK C. TRAVIS is the Regional Managing Member of the Cookeville and Nashville, Tennessee offices of the firm, which he joined in 1988. His law practice includes an emphasis in employment discrimination, wrongful discharge, workers' compensation, labor law and alternative dispute resolution. He received his Bachelor of Science degree in Business Administration from the University of Tennessee, and his law degree from the University of Louisville. A Rule 31 Listed Civil Mediator of the Tennessee Supreme Court, Mark has also received certification in labor relations and collective bargaining from the Cornell University School of Labor and Industrial Relations, and is an Adjunct Professor of Labor and Employment Law at Tennessee Technological University. Mark is also the Coordinator of the Grievance Mediation Program for the Tennessee Center for Labor-Management Relations. He is the author of the Tennessee Workers' Compensation Handbook, and serves on the Editorial Advisory Board for the Tennessee Workers' Comp Reporter. Mark is a member of the Labor and Employment Law and Dispute Resolution sections of the American and Tennessee Bar Associations. In the community, Mark is a member of the Upper Cumberland Chapter of the Society for Human Resource Management, Cookeville Breakfast Rotary Club and Leadership Putnam. He serves on the Board of Trustees for First United Methodist Church and the College of Business Administration Board of Trustees at Tennessee Technological University, and has also served on the Board of Directors for the Tennessee Vocational Training Center.

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In addition to trafficking in illegal aliens and/or counterfeiting documents, ICE is also interested in rampant criminal activity among alien workers. That is, if reports come to ICE's attention that large numbers of an employer's alien work force are engaged in criminal activities, even unrelated to immigration crimes, such as robbery, etc., an investigation may ensue in order to eliminate the criminal elements from the locality. In some cases, ICE may respond to complaints, news accounts, or tips, to investigate a particular employer's situation.

ICE Audits

If the investigation reveals that the employer has a large illegal workforce, or employees engaged in illegal document counterfeiting and/or other criminal activities, ICE may contact the employer and come in and conduct a complete immigration audit. The audit will include not only the checking of all I-9s, but also may (but not always) include checking of Social Security and/or alien registration numbers to determine whether they are mis-matches. Sometimes such audits of mis-matches will be done only on a random basis, and if the proportion of mis-matches is not high, no further review of mis-matches will be conducted.

If large numbers of mis-matches are found, the next critical issue is what ICE will do about those mis-matches. In general, the ICE is becoming increasingly concerned that it must direct termination of apparent illegals immediately, to avoid condoning the presence of illegals in the workforce, and setting dangerous precedents. However, there is a great deal of confusion here, in part because of the potential effect of the new proposed regulation regarding mis-matches issued by ICE on June 15 of this year, which are still proposed and have not yet been adopted as a final regulation. In general, the proposed regulation provides safe harbor procedures for employers to follow upon receiving notice of a name/number mis-match. The procedures first require the employer to within 14 days check the employer's records to determine whether a discrepancy has occurred, and if no such error is found, to promptly request the employee to determine if the name and social security number in the employer's records are correct. If they are correct according to the employee, the employer is supposed to request the employee to resolve the discrepancy with Social Security. In the event that nothing happens within 60 days of receiving initial notice of the mis-match, and the employer does not verify that the employee's name matches Social Security's records, the employer is supposed to within 3 additional days verify the employee's employment authorization and identity by completing a new I-9 form, but applying slightly different procedures from the initial I-9 form. In general, the additional procedures cannot contain the same Social Security number that is the subject of the prior mis-match notice, and no document without a photograph may be used to establish identity or both identity and employment authorization.

If these new proposed regulations are applied to an ICE immigration audit, then there is tension between the applicability of the new regulations and ICE's general preference for simply telling the employer to terminate the employees. In the latter situation, ICE will require an employer to give those subjects of mis-matches the opportunity to come in and meet with ICE officials to show their legal status, and if they do not appear, they are terminated. ICE has not yet finally decided how to handle the effect of the new proposed regulation. In some cases, it

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is possible that the situation could be affected by the relative diligence of the employer in complying with the law, and whether massive terminations will devastate the employer and/or the local community.

Effect of Political Environment

Another "wild card" in the entire situation is the political environment. The immigration law has basically not changed since 1986, and yet the enforcement policies have varied dramatically. For a period prior to the Clinton Administration, there were a number of well-publicized "raids" across the country in which government buses hauled off large numbers of illegal workers. During the Clinton Administration, there basically was no work site immigration enforcement. Now, with the immigration issue becoming the political issue of the day, the Bush Administration intends to show the public that it is vigorously enforcing the immigration laws, in part to encourage passage of a compromise immigration bill in Congress. No one really knows what the situation will be after the federal legislative bill is resolved.

Some employers have attempted to use political influence to avoid disastrous consequences in immigration actions. This is a subject of strong disagreement as to whether the use of politicians is helpful or not. In some cases, if the appropriate tact is used, involvement by politicians has been helpful. However, in today's political environment, very few politicians are willing to render assistance.

Criminal Prosecutions

ICE has started to utilize criminal prosecutions and forfeiture of assets as a remedy, in lieu of civil fines. In almost every case, such severe prosecutions result from the use of undercover agents to gather "smoking gun" evidence, i.e., direct evidence of criminal involvement by the employer in promoting or condoning counterfeiting of documents and illegal trafficking. ICE is particularly interested in any involvement in such actions by human resource personnel. In general, it is actually a good sign if ICE officials come to the plant and hold meetings with the employer and the like, as when criminal prosecution is contemplated, ICE usually stays out of such direct contact with the employer and turns the matter over to federal prosecutors.

Pilot and IMAGE Programs

It should be noted that ICE is going to be increasingly "pushing" its federal pilot program, as well as possibly the new IMAGE program announced by ICE on July 26, 2006. It is beyond the scope of this article to discuss the advantages and disadvantages of the pilot program, but the writer believes companies should exercise due diligence before joining the program. The IMAGE program is so new that even ICE has little information about it, but it is deemed to be sort of a "best practices" certification of an employer. ICE touts that its pilot program will go a long way to protecting an employer from immigration charges and workforce transitions resulting from ICE enforcement.

Employer Strategy

This article would not be complete without discussing how some of the information gleaned from ICE officials, can affect employer strategy. Only a few select comments will be made, as a full discussion is beyond the scope of this article.

One conclusion is that if an employer should ever get information that any of its managers, supervisors, human resource employees, or even rank and file employees, are engaging in illegal counterfeiting or other criminal activities, appropriate action should be taken. In some cases, it may be appropriate to terminate such a person, even under circumstances where full proof is unavailable, due to the urgency of the issue. Obviously, advice of counsel is necessary, due in part to discrimination and defamation issues.

A couple of comments will be made regarding I-9 record-keeping procedures. First, it is probably a good idea to keep I-9s in separate files, separate from personnel files. One reason is that it facilitates ICE review without allowing them into an employer's personnel files, and another is that it facilitates employer self-audits and corrections.

Another extremely controversial issue pertains to the copying of the documents provided to complete the I-9 form. This writer has traditionally recommended that employers keep copies of such documents, to verify that they looked at the documents, and to show their good faith. However, a number of ICE officials have described in depth some of their investigatory techniques. It was pointed out that an ICE official might confront the Human Resource Department employee who completes the I-9s, the various similar documents showing the print or font or some other detail on the documents to vary, "threatening" the human resource employee that under the circumstances that documents could not appear to be genuine. These countervailing concerns probably can be resolved by use of electronic signing and retention of Form I-9 in accordance with recently promulgated regulations.

IN-HOUSE COMPANY ATTORNEYS URGE LIBERAL APPLICATION OF FMLA

Stacye Choate

...many of these counsel take the approach that if a doctor certified the family member as sick or injured, that generally should be enough.

A group of in-house company lawyers at a recent meeting of the American Bar Association, discussed their approach towards complying with the Family & Medical Leave Act laws. Many of the panelists argued for a liberal application of the law as the "best practice." These counsel argued that it makes better sense to allow the leave and then make sure it is managed properly, than to quibble with employees over whether the situation meets the FMLA standard. Similarly, regarding requests for leave to attend to a sick or injured family member, many of these counsel take the approach that if a doctor certified the family member as sick or injured, that generally should be enough.

All of the counsel agree that employers should insure that the employee provides the necessary certification. In cases of suspected fraud or abuse of FMLA leave, some counsel admitted to, on occasion, hiring a private investigator to track an employee's movements and activities. Such an approach should be used only "as a last resort," because it may not be well received by a judge or jury.

All of the panelists agreed that managing intermittent leave is probably the most difficult part of FMLA compliance. The general recommendations included an effective technology program for tracking intermittent leaves as such leaves are always going to intersect with attendance policies, and documentation is important to head off conflicts.

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