

# The Administration's New Work Site Enforcement Initiatives

## Focus on Employer Compliance Will Increase Audits and Investigations

By Elise Fialkowski

**T**he Obama administration has announced new work site enforcement initiatives and goals that will likely increase the number of investigations as well as I-9 and H-1B audits. In many cases, these audits may be the preamble to criminal enforcement. The administration has pledged to aggressively investigate employers and pursue criminal enforcement wherever possible. While criminal enforcement against employers who hire unauthorized workers began under the Bush administration, recently criminal enforcement actions also have been brought in the H-1B context for egregious violations. The Obama administration has stated that, even more so than the prior administration, the focus will be on employer compliance with immigration rules.

### I-9 Enforcement

Under the Immigration Reform and Control Act (IRCA), all employers are required to verify that individuals hired after November 6, 1986, are eligible to work in the United States. Form I-9, Employment Eligibility Verification,

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issued by the Department of Homeland Security, is the form used by employers to document that employees have authorization to work in the United States. The employee must first fill out section 1 of Form I-9 and produce documentation evidencing identity and work authorization. A variety of documents are acceptable evidence of employment authorization and identity for Form I-9. There are "List A" documents that provide evidence of both identity and work authorization. Examples include a U.S. passport or a green card. Employees also may present a combination of a "List B" identity document and a "List C" work authorization document. Examples of such combined documents include a "List B" driver's license and a "List C" social security card. The employer cannot ask the employee to provide specific documents; rather, the employee should be presented with the list of acceptable documents from which he or she can choose which document or documents to submit. In completing section 2 of the I-9, the employer affirms that it has reviewed the documents and they appear to be reasonably genuine and to relate to the employee. An employer must retain these I-9 forms for the longer of three years after hire or one year after termination and make them available for audit.

The Obama administration has pledged to continue—and in fact increase—vigorous criminal enforcement against employers that employ unauthorized workers. The Bush

administration conducted a series of high-profile raids that resulted in criminal charges against employers as well as the apprehension of large numbers of undocumented workers. For example, in 2008 under the Bush administration, Immigration and Customs Enforcement (ICE) made 5,184 administrative arrests of unauthorized alien workers and 1,103 criminal arrests tied to work site enforcement. Of the individuals criminally arrested, however, only 135 were owners, managers, supervisors, or human resource employees. The majority of the remainder were workers charged under identity theft statutes. Janet Napolitano, Obama's secretary of homeland security, has indicated a shift away from apprehension of the undocumented workers in large-scale raids to a clear focus on employers including detailed up-front investigation on employer compliance prior to enforcement activity.

The large-scale raids under the Bush administration enraged the Latino community and religious leaders, immigrant advocates, and civil liberties groups important to the Democratic base and they stepped up pressure on Obama to stop them. In response, Janet Napolitano has charted a middle course, ordering a review of which immigrants will be targeted for arrest and emphasizing that she intends to focus even more on prosecuting criminal cases of wrongdoing by companies. Such action is consistent with her testimony during her confirmation hearing in which she stated that she expects "to increase the focus on

ensuring that employers of unlawful workers are prosecuted for their violations.” Moreover, she pledged to subject employer violators to “appropriate criminal punishment” and to encourage employers to work with federal immigration agents “to establish sound compliance programs that prevent unlawful hiring.”

On April 30 of this year, the Department of Homeland Security (DHS) and ICE, the enforcement branch of DHS, issued a new Worksite Enforcement Overview and Worksite Enforcement Strategy Fact Sheet. Consistent with prior statements, both these documents announced that Napolitano has issued a directive “outlining that ICE will focus its resources in the work site enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration.” The Strategy Fact Sheet emphasizes that ICE will aggressively investigate using an array of sources including “tips from the public, reports from a company’s current or former employees, even referrals from other law enforcement agencies” as well as a variety of techniques commonly used in criminal prosecutions. The fact sheet emphasizes that, through these methods, ICE will aggressively investigate and pursue trafficking, smuggling, harboring, visa fraud, document fraud, money laundering, and other criminal conduct by employers. It is clear that the Obama administration is focusing on significant up-front investigation rather than large-scale raids.

In October 2009, pursuant to a Freedom of Information Act request, ICE released its internal Worksite Enforcement Strategy policy memorandum underlying its April 30 fact sheet (“the Memorandum”). The Memorandum leaves absolutely no doubt that the clear focus is on employers, including criminal enforcement wherever possible: “The criminal prosecution of employers is a priority of ICE’s work site enforcement program and interior enforcement strategy. ICE is committed to targeting employ-

supervisors, and others in the management structure of a company for criminal prosecution through the use of carefully planned criminal investigations.”

Not only will ICE use traditional criminal enforcement methods, but the Memorandum emphasizes that administrative tools will be used “to advance criminal cases, and, in the absence of criminal charges, to support the imposition of civil fines and other available penalties.” Indeed, the Memorandum

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makes clear that the “the most important administrative tool is the Notice of Inspection (NOI) and the resulting Form I-9 audit” as it not only will support the imposition of civil fines and other available penalties, but it “will often serve as an important first step in the criminal investigation and prosecution of employers.”

Consistent with this use of I-9 audits as the key administrative tool, ICE announced a nationwide initiative to audit employers’ Form I-9 employment eligibility verification records. As part of this initiative, in the first week of July 2009 alone, ICE issued Notices of Inspection to 652 employers across the country. In comparison, only 503 Notices of Inspection were issued in all of fiscal year 2008. This widespread enforcement initiative is much different than any in the past. In the past, initiatives often focused on the most likely offenders—employers in industries such as meat-packing, construction, landscaping, and manufacturing—commonly believed to regularly hire unauthorized workers. While certain of these businesses were included within the 652 I-9 audits, the reach was much broader to include a wide variety

of businesses throughout the entire country. The message is clear—no employer is safe from an I-9 audit and investigation.

In addition to using I-9 audits to advance criminal cases, ICE will pursue any available penalty, including civil fines and debarment from federal contracts. Currently, employers who fail to properly complete the required I-9 documentation face a civil fine of up to \$1,100 per employee, while those found to have knowingly hired and continued to employ an unauthorized worker face a civil fine of up to \$3,200 per employee for a first-time offense and a civil fine of up to \$16,000 per employee if an employer has more than two offenses. As ICE recognizes in its Memorandum, debarment “carries highly significant consequences.” Accordingly, ICE also has been increasingly pursuing debarment to preclude companies that knowingly hire unauthorized workers from securing work on federal contracts.

In order to avoid potential liability, employers are advised to develop and implement detailed I-9 policies and practices. ICE recommends that employers, at a minimum, establish an internal training program, with annual updates, on how to manage completion of Form I-9 and how to detect fraudulent use of documents in the I-9 process; permit the I-9 and any E-Verify process to be conducted only by individuals who have received training; and include a review of the completed I-9 and documents by a second person as part of each employee’s verification to minimize the potential for a single individual to subvert the process. Most effective I-9 compliance policies will track these recommendations.

Internal audits—conducted before ICE comes knocking on the door—are essential to limit liability and assess compliance. Indeed, once an NOI is issued, the employer has only three days to respond and produce all I-9 records. Accordingly, should an NOI be issued, businesses are well advised to contact their immigration counsel as quickly as possible. It is also advisable, to the extent possible given the limited

time frame, that the company conduct an audit of all I-9s and make any allowable corrections. Employers, however, must be careful to follow proper procedures at all times in any such audits, or face possible additional scrutiny. Employers, for example, should initial and date any correction clearly showing that the I-9 was corrected pursuant to audit. Company representatives responding to the NOIs should always retain copies of any documentation submitted to ICE. Employers who can demonstrate good-faith efforts to comply with immigration laws are more likely to avoid criminal penalties and be assessed lower-level civil fines if violations are uncovered.

It is important to note that although the government has increasingly touted E-Verify, the government's electronic employment eligibility program, as a way for an employer to increase compliance, E-Verify does not insulate an employer from I-9 enforcement actions. E-Verify does not exempt employers from I-9 completion. In order to use E-Verify, an employer must register online with DHS and accept the electronic Memorandum of Understanding (MOU), an agreement between the employer, the SSA, and DHS that details the responsibilities of each with regard to E-Verify. Although an employer who verifies work authorization under E-Verify is presumed to not have knowingly hired an unauthorized alien queried through the system, the E-Verify MOU itself clearly provides participation does not provide a safe harbor from work site enforcement. Indeed, raids against participating employers continue, as evidenced by the August 2008 raid conducted by ICE at Howard Industries, a Mississippi manufacturer of electrical products that participates in E-Verify.

In signing the MOU, the employer also agrees to allow the federal government and designees to conduct site visits, have full access to employment records, and interview employees. The government has refused to limit this provision to E-Verify records and related I-9s. By entering into such an MOU, the employer is waiving its

Fourth Amendment rights and allowing the government free access to employment records, including I-9s completed prior to participation in E-Verify. It is also important to emphasize that to the extent that E-Verify provides any greater protection than that afforded by an employer following the standard I-9 process, such protection only extends to those employees queried under the E-Verify system. E-Verify currently only allows employers to verify the employment of new hires following enrollment and it does not allow for verification of outside contractors or verification of existing current employees. The only exception is under the Federal Contractor Rule. Therefore, E-Verify will not provide any protection with regard to past hires (except for employees assigned to qualifying federal contracts or employees queried under the 180-day option), yet the MOU allows the government unimpeded access to those records.

In addition, recent information released regarding data mining of E-Verify suggests that far from providing protection, the use of E-Verify could result in investigations or enforcement actions. In December 2008, U.S. Citizenship and Immigration Services (USCIS) and ICE negotiated a Memorandum of Agreement (MOA). Pursuant to this MOA, the USCIS Verification Division is charged with (1) the identification and pursuit of suspected employer and employee misuse, abuse, and fraudulent use of E-Verify and (2) the referral of suspected employer and employee misuse, abuse, and fraudulent use of E-Verify to ICE for investigative consideration. Examples of information reviewed include violations regarding employment of unauthorized aliens, failure to use E-Verify for all required employees, and retaining employees after an E-Verify Final Non-Confirmation. Even more troubling, in May 2009, DHS proposed two regulations that would further allow for an expansion of data mining and enforcement activities based upon E-Verify. In these regulations, DHS announced that it intends to establish a system of records in order to mine the E-Verify data to support monitoring and compliance activities.

## H-1B Work Site Enforcement

The H-1B visa allows companies to employ persons temporarily in a "specialty occupation" in the United States, provided that the employer makes certain attestations that the employment of an H-1B worker will not adversely affect the wages or working conditions of the employer's U.S. workers. In addition to the aggressive pursuit of work site enforcement actions against employers with unauthorized workers by ICE, the Department of Labor (DOL) has been actively auditing H-1B employers to ensure that they are in compliance with all H-1B requirements, including, for example, requirements relating to Labor Condition Application (LCA) posting, payment of required wages, public examination of files, and any required nondisplacement inquiries. H-1B employers should be attentive to their wage and hour obligations, ensuring that terminations are effective for purposes of avoiding back-pay claims, and comply with all wage, benefit, notice, and nonbenching requirements. Failures in these areas can result in significant back-pay awards, civil fines, and debarment.

Employers can expect to see increased enforcement in this area by an energized and invigorated DOL under the Obama administration. Indeed, it was recently reported that 250 new investigators are being hired by the DOL—additional hiring that will increase the staff in the division by more than a third. President Obama's new labor secretary, Hilda Solis, has asserted that she will aggressively pursue violations, stating, "There is a new sheriff in town."

Just as the government has turned to criminal enforcement of I-9 requirements, the government has begun to pursue criminal enforcement actions against H-1B employers. As just one example, on January 22, 2009, the federal government filed a 10-count criminal indictment against Vision Systems Group, Inc., an H-1B consulting company, in the U.S. District Court for the Southern District of Iowa. The indictment includes one count of conspiracy, eight counts of mail fraud, and one count of "Notice of Forfeiture" in the

amount of \$7.4 million. In the indictment, the government alleged that Vision Systems submitted false statements and documents in support of their visa petitions, which were mailed or wired to state and federal agencies. Allegations of such false statements include, for example: submissions of LCAs with false representations as to work location, submission of applications that omitted that the employee would be working at a third company as a consultant, submission of LCAs listing a prevailing wage for Iowa when in fact the employee worked in another state, submission of documents falsely representing the residential address of employees, and submission of quarterly reports claiming to employ more workers in Iowa than were actually employed.

Following this indictment, on February 11, 2009, as part of their extensive investigation into suspected H-1B visa fraud, mail fraud, and conspiracy by Vision Systems, ICE agents arrested 11 individuals in seven states. Among the crimes charged against these individuals involved with Vision Systems were conspiracy, mail fraud, wire fraud, and making false statements in an immigration matter.

#### **FDNS Site Visits**

Not only is DOL actively auditing compliance with H-1B LCA obligations, but USCIS has begun to expand its program of visits to the work sites of employers that sponsor foreign workers. The site visits are conducted by USCIS's Fraud Detection and National Security (FDNS) unit. USCIS recently announced that at least 20,000 FDNS site visits are planned.

Although FDNS has conducted site visits for some time, most particularly with regard to religious worker petitions, in the beginning of the 2009 fiscal year, FDNS developed the Administrative Site Visit and Verification Program (ASVVP), which employs private contractors to conduct site visits on behalf of USCIS. These contractors supplement 600 FDNS staff housed in various offices throughout the United States and are being used

not only to investigate religious organizations but also to conduct random inspections of other employment-based visa petitioners. While many of these site visits have recently been conducted with regard to H-1B petitions, the program is not limited to H-1B petitions and may include any other type of nonimmigrant or immigrant employment-based petition.

These site visits are used to verify information provided by the employer in immigration petitions, including not only employer information but also whether the employees are working in compliance with the information contained in the petition and the employer's attestations (including for example, hours, job duties, education requirements, rate of pay). Typically, the officer will arrive unannounced and ask to speak to an employer representative as well as the foreign national employee. The officer also may ask to speak to the employee's manager. The officer also may ask to tour the work site and ask for certain documents, including, for example, payroll records, corporate information, and employee identification such as a driver's license or passport.

In addition to verifying the validity of data contained in an employer's immigration petitions, FDNS officers use information collected during site visits to help USCIS develop a fraud detection database. FDNS officers and contractors gather information to develop employer profiles including factors that could indicate fraud. FDNS will refer suspected cases of fraud to ICE for review and criminal prosecution.

As in the I-9 context, employers are well-advised to establish effective H-1B compliance programs. Employers filing H-1B petitions must closely follow H-1B rules and regulations or face significant back-pay awards, fines, debarment from the H-1B program, and even possible criminal prosecution. It is essential to ensure that the H-1B employer not only fulfills all initial regulatory requirements including proper completion of the public examination file, but also that the employer ensures

H-1B employees are working consistent with the terms of the filed H-1B petitions and related LCAs. This duty continues after filing for the full duration of H-1B status. Any changes to the duties or work location must be discussed with counsel so that appropriate action, including, for example, the filing of a new LCA and/or an amended H-1B petition, is undertaken. Employers also must be prepared for FDNS inspections. Employers are well-advised to consult with their counsel

### **E-Verify will not provide any protection with regard to past hires.**

to develop a policy and program to quickly respond to any such inspections. Such a program should include education of managers and staff regarding such site visits. Employees, for example, must clearly be advised never to guess at any answers. Similarly, it is advisable for businesses to designate key employees with overall responsibility to respond to such site visits. These employees should have quick access to copies of the relevant H-1B petitions and be knowledgeable about information contained in such filings. These policies also should include a review of H-1B petitions to confirm accuracy and policies and procedures to deal with any changes to the terms and conditions of employment.

#### **Conclusion**

The time for immigration compliance has come. Not only should businesses ensure that they do not hire or continue to employ unauthorized workers, but they must also ensure that they are in full compliance with all regulatory requirements, including, for example, H-1B rules and regulations. Establishing internal "best practices" to avoid liability is critical. Effective compliance programs and training are essential to limit liability in this age of increased enforcement.