

Department of Homeland Security Issues New Worksite Enforcement Directive Focusing on Employers Rather Than Employees

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Today the Department of Homeland Security issued a new Fact Sheet on its worksite enforcement strategy, focusing on criminal prosecution of those who employ unauthorized workers. Consistent with recent comments from the Secretary of Department of Homeland Security, Janet Napolitano, DHS has sent new guidance to Immigration and Customs Enforcement (ICE) changing the focus of DHS operations. The DHS cited the fact that employers made up roughly 2% of those arrested in worksite enforcement operations in 2008, then went on to describe their shift in priority from employees to the criminal prosecution of the employers of unauthorized workers. In order to do this, ICE agents are to use their investigative skills to look for abuse of workers, and to arrest employees only after receiving commitments from the US Attorney to prosecute the employers for their criminal violations. The new directive makes clear that unauthorized workers will still be arrested and processed for removal consistent with current immigration laws, although the DHS has changed its raid policy to allow for the increased humanitarian considerations previously only given to employees in raids of at least 150 employees. Now, those same considerations will now be provided in any raids involving at least 25 employees, a dramatic shift in policy. Lastly, the new Fact Sheet confirms DHS' continuing commitment to the E-Verify system, indicating that in terms of the new administration's objectives, E-Verify remains a likely part of all employers' future obligations.

For some time now, we have been describing the change in focus that the Obama administration has appeared to be pursuing, including the shift from large, sweeping raids which were in reality little more than fishing expeditions, to targeted criminal prosecutions of employers who engage in the employment of unauthorized workers, and specifically targeting employers who abuse their "illegal" workforce. Since his initial candidacy, now President Obama has indicated his desire to see less workplace raids and more focus on the employers who violate immigration laws. Secretary Napolitano has indicated that she does not agree with the Bush administration's focus on the total number of arrests, an apparently quota-based system which rewarded the mass arrests of workers, but resulted in comparably fewer prosecutions of their employers.

While this change in focus does not appear to create a safe harbor for the employees working without authorization, it does signal a sea change in the way ICE will engage in worksite enforcement activities. Employers should take notice that they, rather than their employees are now the focus of the investigations and should comply with I-9 requirements to ensure that they are not in violation of the relevant immigration and criminal laws.

We recommend employers contact legal counsel to assist them in creating their own worksite compliance strategy. Such strategy should include scheduled I-9 self-audits, training of Human Resources staff and managers who may be involved in the completion, retention, and re-verification of I-9 forms, as well as the formulation of strict company policies in implementing these changes in order to help protect the company and limit potential liability by fully complying with immigration regulations.