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## IMMIGRATION LAW

### Employees Who Violate Immigration Laws Are No Match for ICE

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*Special to the Legal*

**T**he U.S. Immigration & Customs Enforcement (ICE) bureau is making employer compliance with immigration laws a top priority. According to the ICE,

"Effective worksite enforcement plays an important role in the fight against illegal immigration and in protecting our homeland ... [it is] intended to mitigate the risk of terrorist attacks posed by unauthorized workers employed in secure areas of our nation's critical infrastructure. ... In addition to alleviating the potential threat posed to national security, ICE's efforts also prohibit employers from taking advantage of illegal workers. ICE's Worksite Enforcement Unit also helps employers improve worksite enforcement of employment regulations."

The ICE has a number of weapons in its arsenal to affect its worksite enforcement program, including well-publicized immigration raids in factories, meatpacking plants, janitorial services, and other workplaces and industries believed to employ large numbers of immigrants. In the last year, large-scale immigration raids have taken place in McDonalds locations throughout Nevada; the Michael Bianco Inc. leather factory in New Bedford, Mass.; meatpacking plants in six states; a pallet company in west Phoenix, Ariz. and many others.

Immigration raids are just one of the ICE's weapons. In addition to storming into industries traditionally believed to employ undocumented workers, the ICE is also taking other steps to ensure that employers remain accountable for the

workers they hire.

Through a voluntary program known as "ICE Mutual Agreement between Government and Employers" (IMAGE), the ICE is attempting to partner with employers to verify workers' employment eligibility with the Department of Homeland Security (DHS) and the Social Security Administration (SSA). As part of IMAGE, employers are required to use the Basic Pilot Employment Verification Program, which is managed by the U.S. Citizenship and Immigration Services (USCIS). The basic pilot program compares a Social Security number to an employee's name to identify if the individual is authorized to work and to flag discrepancies and potential instances of identify theft.

However, participation in IMAGE does not protect employers against raids, nor against prosecution for employing undocumented workers. Rather, according to the ICE, "following the prescribed steps of IMAGE could lessen the likelihood that your company is found in violation ... [and] IMAGE participation may be considered a mitigating factor in the determination of civil penalty (fine) amounts should they be levied." Nothing more.

In fact, one of the recent immigration raids was perpetrated on Swift & Co., which had been using the government's basic pilot online program to verify the status of its employees. Moreover, employers seeking to participate in IMAGE must agree to submit to an I-9 audit by the ICE to verify the Social Security numbers of their existing labor forces and to comply with the ICE's "Best Hiring Practices."

While the IMAGE program is presently voluntary, the ICE has clearly articulated its



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intention to make it mandatory for all employers. Toward this goal, the ICE recently published a final rule titled, "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter," amending the regulations relating to when an employer may be charged criminally or civilly for unlawful hiring or continued employment of unauthorized aliens. The SSA uses the "no-match" letters to inform employers that certain employees' names and corresponding Social Security numbers provided on the W-2 Form do not match the SSA's records. Under the amended regulations, once an employer receives a no-match letter, the employer is presumed to have "constructive knowledge" that an employee may not be authorized to work.

The amended regulations describe safe-harbor procedures that the employer can follow in response to a no-match letter to re-verify the information. This is important, as employers often receive "no-match" letters for very legitimate reasons, such as clerical errors, or failure to register a change of name after marriage. Therefore, employers

must navigate carefully to avoid charges of discrimination. If the employer is unable to correct the discrepancy within 93 days, the employer must either terminate the employee or face the risk that the DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien.

It is important to note that compliance with these procedures only ensures that the DHS will not use the "no-match" letter as part of an allegation that the employer had constructive knowledge that the employee was not authorized to work. There still may be other circumstances where the DHS can

consider that an employer knows an employee is unauthorized for employment.

Despite the fact that the ICE has been temporarily enjoined from enforcing these new regulations, employers need to understand the ICE's enforcement position as embodied in these rules and review their policies for dealing with employees whose continued work authorization is questioned. Employer sanctions against the unauthorized employment of foreign nationals are not new. Both by statute and regulations, the employment of unauthorized immigrants is barred when the employer has actual knowl-

edge of the employee's unauthorized status, or when the employer has constructive knowledge of an employee's unauthorized status.

The administration is serious about broadening its ability to identify and prosecute violators. Even if this rule is permanently enjoined, employers should be on notice of the severe criminal and civil penalties of such violations, as the ICE is intent on identifying violators any way it can. •