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New Initiatives Could Bring Increased I-9 and H-1B Investigations

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The Obama administration has announced new worksite 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.

Although criminal enforcement against employers who hire unauthorized workers began under the Bush administration, recently criminal enforcement actions have also 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, all employers are required to verify the identity and work authorization of all individuals hired after Nov. 6, 1986. In order to comply, employers must review acceptable I-9 identity and employment eligibility documents for each employee and complete Form I-9. 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, under the Bush administration in 2008, U.S. Immigration and Customs Enforcement made 5,184 administrative arrests of unauthorized alien workers and 1,103 criminal arrests tied to worksite enforcement. Of the individuals criminally arrested, 135 were owners, managers, supervisors or human resources employees.

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 of 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, 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."

The Department of Homeland Security and ICE issued a new Worksite Enforcement Overview and Worksite Enforcement Strategy Fact Sheet on April 30. Consistent with prior statements, both of these documents announced that Napolitano has issued a directive "outlining that ICE will focus its resources in the worksite 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.

Consistent with the renewed focus on employers rather than undocumented workers, the Fact Sheet further provides: "ICE offices will obtain indictments, criminal arrest or search warrants or a commitment from a U.S. Attorney's Office (USAO) to prosecute the targeted employer before arresting employees for civil immigration violations at a worksite." Unlike the large-scale raids that resulted in the administrative arrest of hundreds of workers and proportionately fewer criminal arrests of employers, the focus will be on significant investigation with the main goal being criminal prosecution of the employer and its owners, managers, supervisors or human resources employees. Therefore, in addition to the investigative methods outlined above, it is likely that there will be a renewed focus on I-9 audits in an effort to gather any evidence of immigration violations. While the focus will be on criminal prosecution, it is clear that ICE will also pursue any civil fines and penalties available.

In order to avoid potential liability, employers are well 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.

H-1B Enforcement

Not only has ICE aggressively pursued worksite enforcement actions against employers with unauthorized workers, but the Department of Labor has been actively auditing employers of foreign national H-1B workers. As in the I-9 context, the Obama administration has pledged aggressive enforcement of employer H-1B wage and hour obligations.

Employers can expect to see increased enforcement in this area by an energized and invigorated Labor Department 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. Obama's new labor secretary, Hilda Solis, has asserted that she will aggressively pursue violations — as she said, "There is a new sheriff in town."

An H-1B visa is a temporary visa that allows companies to temporarily employ persons in a "specialty occupation" in the United States, provided that the employer has obtained a certified Labor Condition Application, or LCA, in which it has attested that employment of an H-1B worker will not adversely affect the wages or working conditions of the employer's

workers who are U.S. citizens.

Within one day of submitting the LCA to the Labor Department, the employer should be sure it has created a "public examination file" containing all of the documentation required by Department of Labor regulations to support the employer's four attestations in the LCA.

In the LCA, the employer is attesting that it has offered a wage that is the higher of the prevailing wage for the occupation or the wage actually paid by the employer to employees with similar qualifications; that it is offering benefits and working conditions to the H-1B employee on the same basis as to U.S. citizen employees; that there is no strike or lockout in the course of the labor dispute in the occupational category for which the H-1B Labor Condition Application is sought; and that the employer has provided notice of the filing of the Labor Condition Application.

The American Competitiveness and Workforce Improvement Act of 1998 added new requirements for employers who use a higher percentage of H-1B workers, including a requirement to recruit in the United States for U.S. workers before hiring an H-1B nonimmigrant and agreeing not to lay off or displace any U.S. workers. The ACWIA also significantly enhances the enforcement system to identify and punish those who do not comply with these requirements. The punishments include repaying salaries to the foreign nationals if it is found that they have been underpaid, as well as fines of up to \$35,000 and debarment from immigration programs for three years.

In H-1B audits, the DOL will not only request to see an employer's public examination files relating to a specific period of time, but they will also request other company records to determine whether an H-1B worker was paid the required wage at all relevant times. The Department of Labor has issued regulations preventing the "benching" of H-1B workers — that is, underpaying or not paying an employee who is not engaged on a matter that will produce revenue for the employer. These regulations impose a requirement that employees in nonproductive status or otherwise temporarily laid off "due to the decision of the employer" continue to receive their normal wages. This requirement only ceases once there is a "bona fide" termination of employment.

U.S. Citizenship and Immigration regulations require that the employer notify USCIS when an H-1B worker is terminated prior to completion of the period of authorized stay. USCIS regulations also require the employer to reimburse the terminated H-1B employee for one-way travel back to his or her last residence abroad if the employer terminates the employee before the completion of the period of authorized stay. These issues frequently arise in H-1B audits and employers have been found to owe back-pay if they have not appropriately notified USCIS or fulfilled the return transportation requirement. As such, it is critical that the employer complies with these rules and effectively documents compliance to avoid back-pay and other sanctions including possible debarment.

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, the federal government filed a 10 count criminal indictment on Jan. 22 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 a "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 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, 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 on Feb. 11. 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.

In light of the renewed focus on H-1B audits and investigations, H-1B employers should be attentive to their wage and hour obligations, ensure that terminations are effective for purposes of avoiding back-pay claims and comply with all wage, benefit, notice and non-benching requirements. Because failures in these areas can result in significant back-pay awards, civil fines, and debarment, employers are also well-advised to consult with knowledgeable counsel to ensure that they are complying with all H-1B requirements. Detailed audits of H-1B public examination files should be conducted to avoid potential liability in this era of increased enforcement.

To effectively deal with increased enforcement, employers are well-advised to develop and implement detailed immigration policies and practices including routine audits to not only assess compliance but limit potential liability. •

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