

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

An incisivemedia publication

I M M I G R A T I O N L A W

The ICE-Man Cometh Again — Avoiding Criminal Immigration Charges

BY ELISE A. FIALKOWSKI

Special to the Legal

For the last two years, Immigration and Customs Enforcement, or ICE, a component of the Department of Homeland Security, also known as DHS, has conducted a series of high-profile criminal enforcement actions against employers meant to emphasize their commitment to enforcement of immigration laws. This enforcement effort results from the public's perception that federal authorities have not done enough to enforce existing immigration laws, including the Immigration Reform and Control Act, or IRCA. In conducting this new enforcement effort, not only is ICE aggressively pursuing criminal actions against employers who have unauthorized workers, but they are using broad new enforcement methods and strategies to uncover and investigate possible violations.

Under IRCA, 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.

In the past, enforcement focused on civil fines and penalties. Rather than administrative fines and penalties, ICE now aggressively pursues criminal enforcement. Employers who are found to have unauthorized workers are now charged with felony criminal violations including knowingly making false statements on Form I-9, conspiracy to knowingly hire illegal aliens, conspiracy to encourage or induce unauthorized aliens to remain in the United States, evasion of federal employment



ELISE A. FIALKOWSKI

is a partner in the Philadelphia office of Klasko Rulon Stock & Seltzer, an immigration boutique. She specializes in employment-based immigration and worksite enforcement. She can be reached at efialkowski@klaskolaw.com.

klaskolaw.com.

taxes, mail fraud, wire fraud, document fraud and money laundering.

In many cases, ICE also charges employers with "alien harboring" — a felony offense prohibiting anyone from "aiding or abetting" an unlawful alien to remain in the United States. While "aiding and abetting" can include facilitating a change in identity, misrepresenting facts on an I-9, assisting in the procurement of false documents, providing housing and warning about impending inspections, several courts have found that unauthorized employment alone is sufficient for a harboring conviction. Managers and executives at a number of companies have now been charged under that provision and where employers have provided transportation to and from work for illegal workers, they have also been charged under the "alien harboring" provision that prohibits transportation of illegal workers within the United States. U.S. attorneys will also use forfeiture provisions available under a variety of statutes to try and seize business assets of the company and personal assets of the owners, on the theory that the illegal employment of workers resulted in the employer's profits from a "criminal enterprise."

The penalties for many of these felonies are severe. For example, the maximum penalty

for alien harboring is five years for each alien harbored, unless the crime is done for commercial advantage or financial gain, in which case the maximum penalty is 10 years. Money laundering is a felony with a potential 20-year prison sentence.

The difference in approach is remarkable. Fiscal year 2002 worksite enforcement actions resulted in only 25 criminal arrests (including arrests of corporate officers, managers, human resource employees and contractors) and 485 administrative arrests of illegal alien workers. In 2007, the numbers grew to 863 criminal arrests and 4,900 administrative arrests. In 2007, ICE also collected more than \$30 million in criminal fines, restitutions and civil judgments in worksite enforcement cases.

The pace is increasing. It is likely that the number of criminal arrests this year will double last year's figures. Michael Chertoff, secretary of DHS, reported that as of May 31, ICE worksite enforcement actions have already resulted in 875 criminal arrests — more than all of last year.

ICE is also using new criminal enforcement tools heretofore unheard of in worksite enforcement. ICE is actively using wiretaps, undercover investigations and confidential informants to investigate and pursue possible worksite enforcement violations. ICE has also exchanged information and coordinated with other federal agencies including the Internal Revenue Service, the Department of Labor and the Social Security Administration. ICE has also coordinated with state and local agencies including, for example, state and local police as well as sheriff's departments. ICE has instituted hot-line numbers to which illegal workers can be reported.

Contrary to prior practice, ICE is also pursuing not only employers but companies that have contractors who are illegal aliens. ICE pursues criminal liability against companies for contractors where the company has knowledge that the contractor is in fact unauthorized. In these cases, ICE generally criminally pursues the staffing company as well as the contracting company.

Even after a raid, ICE often continues to gather information against managers, executives, supervisors and contractors. When a raid occurs, unauthorized workers are generally administratively arrested and immediately taken to detention centers, such as the York County jail. Once arrested, those employees are often interviewed by ICE. Should the unauthorized employee be willing to testify and/or give information implicating the employer, its managers or its executives in criminal wrongdoing, that worker may be released from detention and given employment authorization. Therefore, there is a strong incentive for such unauthorized workers to reveal anything they know about the employer or its managers having assisted the workers to be hired in spite of their lack of lawful status.

Although large cases gain a great deal of attention, as part of this enforcement effort, ICE has just as aggressively pursued small employers and brought significant criminal charges even in cases in which there were few unauthorized workers. In June 2008, the owners of Panda Buffet and Miyako Seafood Buffet in Maryland pleaded guilty to evading taxes and unlawfully employing aliens. The criminal case was brought after the investigation revealed there were six unauthorized workers in 2006 and four in 2007 and that the workers were unlawfully paid in cash. A key factor in pursuit of the investigation appears to be a report from a bank official that the owner was depositing large amounts of cash into the Panda bank account. As part of the plea agreement, the owners agreed to forfeit their interests in the Miyako property, which was purchased in 2004 for \$2.3 million. In addition, the head of the company faces a maximum sentence of 5 years as well as a fine of \$250,000.

The Sun Drywall enforcement action serves as another example of one of the many criminal actions against small employers. In March 2007, six employees of Sun Drywall and Stucco Inc. (including the president, human resource manager, foreman and other managers) were arrested on charges of conspiracy to knowingly hire illegal aliens and conspiracy to harbor illegal aliens as a result of a 16-month

investigation. At the time of the raid, ICE apprehended only eight unauthorized workers. The investigation proceeded after a December 2005 I-9 audit by ICE revealed that the company had accepted counterfeit green cards for 11 of its 115 I-9 Forms.

Reviewing the many criminal enforcement actions brought in the last two years, one can identify a number of factors that suggest a company may be at risk for an ICE raid:

- I-9 Forms are completed and I-9 documentation is reviewed without attention to detail.
- Management is reluctant to question the

The maximum penalty for alien harboring is five years for each alien harbored, unless the crime is done for commercial advantage or financial gain, in which case the maximum penalty is 10 years.

authenticity of any I-9 documentation for inability to obtain needed workers.

- Management allows employees to present new documentation inconsistent with original I-9 documentation without further inquiry.

- The company has received Social Security no-match letters and does not question employees regarding discrepancies or otherwise investigate.

- Management does not address rumors or complaints that there are unauthorized employees or unauthorized contractors.

- The pool of new hires comes mainly from the existing workforce, including their friends and relatives.

- Hiring decisions are not subject to review and made by those who may be sympathetic to those desperately seeking employment or willing to hire for personal gain.

- The company ignores communications from agencies such as workers' compensation or other benefit-issuing agencies that advise the employer either that the submitted employee information is not valid or that a rightful holder of the Social Security card is being

denied benefits because one of their employees is using the rightful holder's information.

Because of the new enforcement partnerships — with federal agencies as well as with local law enforcement and other benefit issuing agencies — ICE is obtaining and pursuing, through active investigation, many leads. Take, for example, an employee who is arrested. Under the new model, that employee is often actively questioned by local law enforcement as to his status and then turned over to ICE which then questions him about his employment, whether there are any other unauthorized workers and how he obtained documentation. If the employee agrees to provide information, ICE may then allow his release as a confidential informant.

ICE also actively pursues tips and leads from many sources — dissatisfied, disgruntled or terminated workers, employees (including human resource professionals) whose complaints and concerns with regard to unlawful employment are ignored, as well as those that have observed employers transporting or housing numbers of individuals who appear to be unauthorized. In many cases, after receiving such tips, ICE will initially investigate by reviewing Social Security records or conducting an I-9 audit. To the extent that the initial review uncovers irregularities, the investigation may continue and may ultimately lead to a raid and criminal charges. Indeed, with rising unemployment rates and illegal immigration and enforcement in the forefront of national debate, it is likely that the number of leads and tips to ICE will continue to increase.

In this age of increased enforcement, employers must take steps to reduce risk and assure compliance. Management procedures and policies that effectively address work authorization rules and procedures will help protect against unexpected liability for improper hires. Employers should carefully review their hiring practices and develop a compliance program including detailed policies and procedures. At a minimum, policies should detail I-9 procedures, provide for regular training, provide for completion of I-9s only by those who have received training, provide for audits by an external firm or auditor not otherwise involved in the I-9 process, address handling of SSA no-match letters and prohibit discriminatory implementation of the policy. Employers must also be sure that their staffs are trained in I-9 compliance and they have created a "culture of compliance" to avoid violations and the criminal charges such violations may bring. •