



Employer Liability for Hiring Illegal Aliens

By Sanford A. Posner

The Immigration and Customs Enforcement (ICE) branch of the Department of Homeland Security (DHS)¹ has made great strides in its enforcement capacity since its inception in 2003. With an increase in hiring and training, ICE has moved away from solely dealing with high-priority targets, i.e., employer sites near airports, bridges, and other infrastructure, and is now building cases against private employers regardless of their size and location. In recent months, ICE units have performed well-orchestrated raids against beef and poultry processing plants; farm labor contractors; and small, privately owned restaurants.

When the immigration services conducted a raid on a private business in the past, the end result may have been a civil fine or the business equivalent of a slap on the wrist. ICE has moved away from using a civil fine as a penalty and instead is targeting employers who break immigration regulations with criminal penalties in addition to fines. The development of the case by ICE agents usually results in the arrest of U.S. citizen managers or executives who have contact with or knowledge of their employee ranks. If, in the past, employers were not too concerned about becoming a target of an ICE raid, then those days are over. Employers now need to make an extra effort and spend the time necessary to develop policies that will allow them to hire and retain a legal workforce.

¹The home page for the immigration service is <http://www.uscis.gov/portal/site/uscis>.

The I-9 Form: The Employer's Shield

The I-9 form has been in existence since the Immigration Reform and Control Act (IRCA) regulations went into effect in 1986. The I-9 document² is designed to allow employers to verify a new employee's identity and work authorization. Regulations require that the employer complete the document within 3 days of the employee's hire. The I-9 form underwent a recent revision that shortened the list of allowable documents that could be presented to prove identity and work authorization in the United States. However, despite the apparent simplicity of the form, there are many instances where it is not properly completed by the employee and the employer. The failure to fully and accurately execute the I-9 document is a Pandora's box waiting to be opened.

An employer can decrease its risk of an ICE investigation and assess its potential for exposure by developing and implementing an I-9 self-audit and follow-up process. Employers who have never audited their I-9 records could be surprised by the results of an examination of those records.

²The I-9 form and the official government manual on how to complete the form can be found at the following Web address: <http://www.uscis.gov/files/nativedocuments/m-274.pdf>. The manual contains over 40 pages of useful information and employer guidance. The manual addresses basic concerns about completing the I-9 document and provides contacts to government offices that can assist an employer with basic questions.

Basic I-9 Audit

Assemble all completed I-9 forms. Compare the completed list of I-9s against your current employee rolls. Verify that you have a complete I-9 for each employee. If you do not have an I-9 form for all of your active employees, then immediately properly complete one for the employee. A complete I-9 should also be on file for former employees for at least 1 year after their last day of work or for 3 years from their date of hire, whichever is the longer period.

Try to have a manager audit the I-9 files who did not complete the original document. A fresh set of eyes is usually more efficient in detecting errors.

If an I-9 form is not complete, then complete the form as needed and initial and date the correction. If it is not possible to make the corrections on the form, then attach the newly completed I-9 form to the existing I-9 record. During the completion of the I-9 form it is not a requirement that the employer be an expert in document recognition. If the document presented is “facially” accurate, then it should be accepted.

When the basic audit has been completed, then the human resources manager and his or her team should discuss the results. The purpose of the review is to determine deficiencies and to develop a plan to remedy them. The review process should set a time for a follow-up audit and to institute an annual audit of the I-9 documents. During the review of the audit results, the participants should discuss a method of calendaring dates to follow up with employees who have limited work authorization and to discuss whether it would be in the employer’s best interest to enroll in the government’s E-Verify program.

I-9 Penalties

An employer could face civil and criminal penalties for violating the I-9 provisions. The penalties are as follows.

- ◆ Not less than \$250 and not more than \$2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

- ◆ Not less than \$2,000 and not more than \$5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or
- ◆ Not less than \$3,000 and not more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph.³

The body determining the fine, either ICE or an administrative law judge, will consider the following mitigating factors.

- ◆ The size of the business of the employer being charged;
- ◆ The good faith of the employer;
- ◆ The seriousness of the violation;
- ◆ Whether or not the individual was an unauthorized alien; and
- ◆ The history of previous violations of the employer.⁴

If the attorney general has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of § 274A(a)(1)(A) or (2) of the Act, the attorney general may bring civil action in the appropriate United States District Court requesting relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the attorney general deems necessary.⁵

Additional sanctions and penalties could be meted out by ICE or an administrative law judge to a respondent found to have knowingly hired, or to have knowingly recruited or referred for a fee, an unauthorized alien for employment in the United States or to have knowingly continued to employ an unauthorized alien in the United States. The employer could be issued a cease and desist order from such behavior or to pay a civil fine based on the following schedule.⁶

³ INA § 274A(i)(ii)(iii).

⁴ 8 CFR § 274a.10(b)(2).

⁵ 8 CFR § 274a.10(c).

⁶ 8 CFR § 274a.10(b)(1).

- ◆ First offense—not less than \$275 and not more than \$2,200 for each unauthorized alien with respect to whom the offense occurred before March 27, 2008, and not less than \$375 and not exceeding \$3,200 for each unauthorized alien with respect to whom the offense occurred on or after March 27, 2008;⁷
- ◆ Second offense—not less than \$2,200 and not more than \$5,500 for each unauthorized alien with respect to whom the second offense occurred before March 27, 2008, and not less than \$3,200 and not more than \$6,500 for each unauthorized alien with respect to whom the second offense occurred on or after March 27, 2008;⁸ or
- ◆ More than two offenses—not less than \$3,300 and not more than \$11,000 for each unauthorized alien with respect to whom the third or subsequent offense occurred before March 27, 2008, and not less than \$4,300 and not exceeding \$16,000 for each unauthorized alien with respect to whom the third or subsequent offense occurred on or after March 27, 2008;⁹ and to comply with the requirements of § 274a.2(b) of this part, and to take such other remedial action as is appropriate.¹⁰

Avoiding Discrimination

It is common that an employer would try to properly comply with the I-9 regulations and in its zealotry may come close to stepping over the line of discrimination. Obviously, an employer should not engage in discriminatory hiring practices, but its efforts to avoid the appearance of discrimination may cause it to tiptoe around compliance matters for fear of raising this charge as it pertains to national origin or citizenship. Accordingly, claimants must show that the employer had a discriminatory intent for purposes of satisfying the elements of this claim.¹¹

⁷ 8 CFR § 274a.10(b)(1)(ii)(A).

⁸ 8 CFR § 274a.10(b)(1)(ii)(B).

⁹ 8 CFR § 274a.10(b)(1)(ii)(C).

¹⁰ 8 CFR § 274a.10(b)(1)(iii).

In an effort to educate employers, OSC Special Counsel John D. Trasviña offered the following sample questions for use in determining a potential hire's legal authority to work in the United States:¹²

Are you legally authorized to work in the United States?

___ YES ___ NO

Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)?

___ YES ___ NO

The questions should be used by employers either orally or on their employment application. An employer who uses these questions will not be exposed to discrimination liability under INA § 274B.

Electronic Verification

One of the latest tools at the disposal of employers is the E-Verify program developed by the U.S. government. The initial program was called Basic Pilot and it has since evolved and expanded in its scope. The E-Verify system allows participating employers to tap into government databases to determine whether a new hire has work authorization. The system is offered at no charge to employers that register with the government to take advantage of the system.

Once an employer is properly registered with the program, then it is issued a log-in code and password. The employer is able to check information on the completed I-9 form “against the 425 million records in the Social Security Administration’s database and more than 60 million records in the DHS immigration databases.”¹³ An employer is only allowed to check the data on new hires. The E-Verify program is a forward-looking system. The system was recently enhanced to include photo

¹¹ INA § 274B(a)(6).

¹² Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) Memorandum, J. Trasviña, “Pre-Employment Inquiries Regarding Sponsorship for an Employment Visa” (August 6, 1998).

identification. The new feature will eventually allow an employer to verify a new employee's identity with an electronically stored image.

Despite the claims that the E-Verify system might issue false negatives, it is rapidly being adopted by employers. The federal government is offering incentives to employers who adopt the program and who are in need of foreign nationals to complement their workforce.¹⁴

Good Faith Compliance

Despite the best efforts of an employer to adhere to and follow the IRCA provisions, it may still face an audit by ICE. During the course of the audit, the employer should be able to document its "good faith" compliance with existing regulations. An employer can demonstrate "good faith" compliance by showing to the government the following type of evidence.

1. Documentation that demonstrates the training human resource professionals receive in completing I-9 documents and verification of attendance by those employees;
2. Documentation of regular self-audits of the company's I-9 forms;
3. Participation in the E-Verify program;
4. If the employer makes use of contract labor, then have written and signed documents that require contractors to adhere to all applicable immigration laws and regulations to ensure only workers with proper authorization are placed on the employer's work site.

Additionally, the late Congressman Sonny Bono introduced The Bono Amendment to provide employees with a 10-day window in which to remedy infractions in certain circumstances.¹⁵ The regulation should be read in conjunction with the memo issued by the legacy INS in April 1998.¹⁶ The memo provides a

comprehensive guide that employers can use to determine which issues are "technical" or "procedural" violations and therefore diminish a possible fine or appearance of noncompliance with applicable regulations.

Criminal Penalties

The previous sections of this article addressed basic I-9 issues, civil penalties, and defenses an employer can utilize to decrease and possibly eliminate exposure. However, there are times when ICE will deem that criminal penalties will be warranted. Two main types of federal charges are "harboring" and "money laundering."

Harboring an illegal alien is a felony violation with a penalty of 5 years of imprisonment for each alien harbored.¹⁷ If the infraction is committed for commercial advantage or for private financial gain, then the penalty is increased to up to 10 years of imprisonment.¹⁸ The elements of a harboring claim are as follows.

- ◆ While knowing or recklessly disregarding that a person has come to, entered, or remains in the United States in violation of law;
- ◆ "Harboring," concealing, or shielding from detection;
- ◆ A person who has come to, entered, or remains in the United States in violation of the law.¹⁹

An employer could be found to have committed the crime of harboring by alerting its workforce to an impending immigration raid. Harboring also includes hiring a contractor who is illegally present in the United States, and the employer knows this fact, to provide services or to contract others who are illegally present in the United States to work for the employer. An employer could run afoul of the law by providing housing

¹³ U.S. DHS, "E-Verify Fact Sheet" (August 9, 2007). Employers can register for the E-Verify program by using the following Web address: <https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES>.

¹⁴ See the recent regulations pertaining to employers that hire F-1 students under the STEM program (<http://edocket.access.gpo.gov/2008/pdf/E8-7427.pdf>).

¹⁵ 8 USC § 1324a(b)(6).

¹⁶ Immigration and Naturalization Service (INS) Memorandum, P. Virtue, "Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996" (March 6, 1997).

¹⁷ 8 USC § 1324(a)(1)(B)(ii).

¹⁸ 8 USC § 1324(a)(1)(B)(i).

¹⁹ 8 USC § 1324(a)(1)(A)(iii).

and transportation to workers who are illegally present in the United States and the employer knows that they are illegally present. The scope of the harboring offense is being expanded and defined by the various federal circuits.

Money laundering, in an immigration setting, is committed when proceeds are collected from a felony transaction. The transgressors must be aware that they are receiving funds from criminal conduct. There are “specified unlawful activities” enumerated in 18 USC § 1956 that spell out the broad scope of activities that fall under the purview of money laundering. The maximum penalty for felony money laundering can be either 10 years or 20 years per violation based on which section of the federal code is violated.

Both causes of action carry stiff fines in addition to potentially lengthy jail sentences. The fine for a conviction of felony harboring is either \$250,000 or twice the gain to the defendant, whichever is greater.²⁰ Based on the type of money laundering count a defendant is guilty of, he or she can be fined the greater of \$500,000 or twice the amount laundered²¹ or a court-imposed fine of up to twice the amount of money laundered.²²

On top of both the jail time and the fines associated with the previous causes of action, a defendant could be forced to forfeit assets to the government. According to INA § 274(b), the government may seize and forfeit civilly any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a harboring offense, the gross proceeds of such an offense, and any property

traceable to such conveyance or proceeds. A forfeiture action can also be expected in a money laundering charge.

Summary

Given the changing immigration climate in which businesses operate, an employer can no longer ignore or turn a blind eye to its obligations in regard to work authorization compliance. The Department of Homeland Security is now receiving the financial backing and the personnel to follow up on leads and tips and to investigate employers, both large and small, who are not meeting their obligations under the law. We have seen evidence that ICE is willing to investigate and file federal criminal charges against employers that operate multi-state companies or that have small businesses. The best shield that an employer has at its disposal is the I-9 form and the employer’s ability to document a pattern and practice of good faith compliance with the law. EPLiC

Sanford A. Posner is a partner in the Atlanta law firm of Elarbee, Thompson, Sapp & Wilson. He practices exclusively in the area of immigration and naturalization law. Mr. Posner represents multinational clients and individuals who are pursuing non-immigrant and immigrant visas, working regularly with technology companies seeking both long-term and short-term immigration opportunities for their employees. In 2007, he received the Atlanta Super Lawyer-Rising Star award. He earned his J.D. degree, cum laude, from Georgia State University Law School and his B.A. degree from the University of Colorado. Mr. Posner can be reached by e-mail at posner@elarbeethompson.com or by telephone at (404) 582-8420.

²⁰ 18 USC §§ 3571(b)(3), (d).

²¹ 18 USC §§ 1956(a).

²² 18 USC § 1957(b)(2).