

Lawbreaker, Naïf or Stooge? – The HR Representative and I-9 Crimes

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“The job holder most likely to serve time worked in human resources.” Northern Illinois University College of Law professor Lorraine Schmall came to this conclusion after reviewing criminal worksite enforcement proceedings at the end of the Bush administration in 2008.¹ While large-scale foreign-national employee prosecutions and removals in connection with worksite raids under the Bush administration attracted more publicity,² the number of criminal prosecutions of business owners and managers also increased. The Obama administration has moved away from high-profile worksite raids, favoring instead “audits” (called “silent raids” by some) that in effect force employers to terminate the employment of unauthorized workers.³ Even so, Homeland Security Secretary Janet Napolitano in her Senate confirmation hearings also pledged “appropriate criminal punishment” for “unscrupulous employers.”⁴ So, regardless of which party is in office, employers and their human resources representatives have to be aware of potential criminal liability.

Reality check: The resources for worksite enforcement are extremely limited, and the likelihood of getting caught is slim. There are between 6 million and 10 million employers in the United States,⁵ and during fiscal year 2008, Immigration Customs and Enforcement (ICE), the enforcement arm of the Department of Homeland Security (DHS), made 5,173 administrative immigration arrests at worksites and 1,101 criminal

¹ Lorraine A. Schmall, *Worksite Enforcement of US Immigration Laws*, The Professor's Column, N. Ill. U. C. L. (Aug. 20, 2008), available at http://www.niu.edu/law/faculty/directory/lorraine_schmall.shtml, at 1. See also Lorraine A. Schmall, *Federal Worksite Enforcement of US Immigration Laws*, June 1, 2009, at <http://www.ilo.org/public/english/protection/condtrav/pdf/rdwpaper36a.pdf>. (All hyperlink citations are valid as of August 17, 2010.)

² See, e.g., Kim Nguyen, Associated Press, “Immigration agents raid six Swift meat plants,” USA Today, Dec. 12, 2006, available at http://www.usatoday.com/money/industries/food/2006-12-12-immigration-swift_x.htm. See also Nigel Duara, William Petroski and Grant Schulte, “Claims of ID fraud lead to largest raid in state history,” DesMoinesRegister.com, May 12, 2008, available at <http://www.desmoinesregister.com/article/20080512/NEWS/80512012/Claims-of-ID-fraud-lead-to-largest-raid-in-state-history>.

³ See Julia Preston, *Illegal Workers Swept From Jobs in ‘Silent Raids,’* The New York Times, July 9, 2010, available at <http://www.nytimes.com/2010/07/10/us/10enforce.html>.

⁴ Stewart M. Powell, *Napolitano signals shift in worksite raids*, Houston Chronicle, Jan. 15, 2009, available at <http://www.chron.com/disp/story.mpl/special/immigration/6214449.html>

⁵ Compare the Department of Labor’s Summary of the Major Laws of the Department of Labor at <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (estimating approximately 10 million employers) with SBA [Small Business Administration] Office of Advocacy’s Frequently Asked Questions at <http://www.sba.gov/advo/stats/sbfaq.pdf> (6.0 million firms with employees in 2006, according to latest census data available).

arrests in connection with worksite investigations.⁶ (No statistics are available for 2009 or 2010, although an ICE official has indicated that worksite arrests decreased in 2009 because of the shift in strategy away from raids.⁷ This decrease will presumably be reflected in the statistics for foreign national employees; the number of arrests of employers and their managers most likely stayed constant or increased in 2009 in light of the employer-focused strategy in effect.) Using a conservative estimate of 6 million employers and combining both administrative and criminal arrests would mean just a 1/10 of 1% chance of being arrested. However, according to ICE statistics, of the more than 6,000 arrests related to worksite enforcement in 2008, only 135 were employers.⁸ That reduces the chances to approximately 2/1000 of 1%.

Even so, HR professionals don't generally consider criminal prosecution to be an occupational hazard, so any risk at all of potential liability is unsettling. Moreover, compared to prior years, enforcement has been ratcheted up significantly. In 2002, ICE made only 25 criminal and 485 administrative arrests (as opposed to the 1,101 criminal and 5,173 administrative arrests in 2008), and in each intervening year the total number of arrests has increased, with the largest jump in 2006.⁹ Compared with how infrequently criminal charges were brought in the past, the number of cases in the last few years is huge.

Another significant development is that the government is not just going after the company as an entity – it is actually prosecuting owners and employees of the companies, not only for violations of Immigration and Nationality Act § 274A, 8 USC § 1324a, the statutory provision making employment of unauthorized workers a misdemeanor,¹⁰ but also under provisions as diverse as money laundering, as well as other immigration-related provisions prohibiting the harboring of unauthorized workers and the use of false attestations, discussed in more detail below. Finally, as mentioned above, the Obama administration has signaled that it intends to focus its resources on “unscrupulous employers.”

By way of background, voluntary employer compliance has always been a cornerstone of the I-9 employment eligibility verification program – the form's instructions have always clearly stated that it

⁶ U.S. Immigration and Customs Enforcement News Release, Nebraska business owner sentenced to 30 months for hiring illegal aliens (December 10, 2008), available at <http://www.ice.gov/pi/nr/0812/081210omaha.htm>. “Administrative arrests” are detentions of foreign nationals who are without valid immigration status or working without authorization in the United States.

⁷ Penny Starr, “ICE Official: Work-Site Arrests of Illegal Aliens ‘Down From Previous Years,’” CNSNews.com, Feb. 3, 2010, available at <http://www.cnsnews.com/news/article/60925>.

⁸ U.S. Department of Homeland Security Fact Sheet, Worksite Enforcement Strategy (Apr. 30, 2009), available at http://www.ice.gov/doclib/pi/news/factsheets/worksite_strategy.pdf.

⁹ U.S. Immigration and Customs Enforcement, ICE Fiscal Year 2008 Annual Report, at 17, available at http://www.ice.gov/doclib/about/ice08ar_final.pdf.

¹⁰ INA § 274A(f)(1), 8 USC § 1324a(f)(1), provides that “Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) [hiring a worker with knowledge that the person is not authorized to work] or (a)(2) [continuing to employ a worker with knowledge that the person is or has become unauthorized] of this section shall be fined not more than \$3,000 for each unauthorized [worker] with respect to whom such a violation occurs, imprisonment for not more than six months for the entire pattern or practice, or both....”

should not be filed with any government agency. The current version's instructions state in bold: DO NOT MAIL COMPLETED FORM TO USCIS OR ICE. (USCIS, or U.S. Citizenship and Immigration Services, is the DHS unit responsible for adjudicating immigration benefits.) Whether justified as creating a "culture of compliance"¹¹ or criticized as "enforcement by propaganda,"¹² DHS has no choice but to highlight its enforcement efforts in the hopes of encouraging voluntary compliance by the majority of employers.

As mentioned above, ICE has prosecuted under a variety of criminal provisions, including money laundering. One reason for this was the expertise gained from customs officials when their enforcement division was merged with immigration enforcement in 2003 as part of the restructuring of the Immigration and Naturalization Service and creation of the Department of Homeland Security.¹³ This strategy also allowed for a greater selection of enforcement tools, including felony charges and the forfeiture¹⁴ of assets. Other criminal charges include inducing foreign nationals to live in the United States without authorization,¹⁵ harboring unauthorized workers,¹⁶ using false attestations to satisfy immigration law requirements,¹⁷ aiding and abetting the use of fraudulent identification documents, and related crimes such as conspiracy¹⁸ to do these things or racketeering charges.¹⁹

¹¹ U.S. Immigration and Customs Enforcement, ICE Fiscal Year 2008 Annual Report, at 16, available at http://www.ice.gov/doclib/about/ice08ar_final.pdf. See also Julia Preston, "Illegal Workers Swept From Jobs in 'Silent Raids,'" The New York Times, July 9, 2010, available at <http://www.nytimes.com/2010/07/10/us/10enforce.html>, which quotes ICE chief John Morton that the purpose of the worksite audits was to create "a culture of compliance" in which employers would routinely verify the immigration status of their workers. He also said ICE was most interested in finding "egregious employers."

¹² David Whitlock, an immigration and labor lawyer, interviewed by the Chicago Tribune, in Frank James, *Feds threaten more raids on employers - Immigration lawyers see political motives*, Chicago Tribune (Apr. 21, 2006), available at http://www.chicagotribune.com/news/nationworld/chi-0604210173apr21_0_2615607.story. See also Schmall, *Worksite Enforcement of US Immigration Laws*, The Professor's Column, N. Ill. U. C. L. (Aug. 20, 2008), *supra*, at 6.

¹³ See Eric Rich, "Immigration Enforcement's Shift in the Workplace – Case of Md. Restaurateurs Reflects Use of Criminal Investigations, Rather Than Fines, Against Employers," The Washington Post, April 16, 2006.

¹⁴ 18 USC §§ 982(a)(6) and 982(b).

¹⁵ 8 U.S.C. § 1324(a)(1)(A)(iv) and (v).

¹⁶ 8 USC § 1324(a)(1)(A)(iii). In 1986, with the passage of the Immigration Reform and Control Act, Congress removed the so-called Texas proviso which had stated that employment could not be treated as harboring. Until fairly recently, harboring has historically only been prosecuted in egregious cases and has not generally been the subject of successful criminal convictions. See *Trollinger v. Tyson Foods*, No. 4:02-CV-23, at 18 (E.D. Tenn. May 18, 2007) (recognizing that a violation of 8 U.S.C. § 1324(a)(1)(A)(iii) requires more than "mere hiring"); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 307 (D.N.J. 2005).

¹⁷ 18 USC § 1546(b)(3).

¹⁸ 18 USC § 371; 8 USC § 1324(a)(1)(A)(v).

¹⁹ 18 U.S.C. § 1961(1)(F), defining as "racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (RICO), any act which is indictable under § 274 of the Immigration and Nationality Act [8 U.S.C. § 1324].

The cases provide a number of lessons to HR professionals. First, a number of cases arose after the employer was put on notice that an employee might not have authorization to work and the employer or a staff member then tried to help the foreign national so that employment could continue.²⁰ Second, foreign national employees have testified against their employers by confirming that the employer knew that the employee lacked authorization to work.²¹ Finally, in one case, the HR director argued that the employer required him to do what he did, but that was no defense: He was still sentenced to three years of probation.²²

In light of these developments, what do HR professionals need to know to protect themselves?

- Know your industry. Although ICE denies profiling, the latest audit surge does target industries with greater perceived abuse, which includes manufacturing. Many of the criminal enforcement actions were brought against meat and poultry processing firms, agricultural operations, restaurants and construction companies. Other industries with a heavy reliance on foreign labor include sanitation and janitorial services, landscaping, and certain healthcare occupations. HR professionals in those industries should be more cautious.
- Engage counsel to conduct an internal review of the employer's Forms I-9 to assess how compliant it is and what the potential exposure is to civil and criminal penalties.
- Investigate suspicious circumstances and credible tips suggesting the possibility of unauthorized employment in the workplace. Follow up promptly with corrective measures by providing employees a reasonable opportunity to demonstrate employment eligibility, and where appropriate, by terminating the employment of individuals who acknowledge that they are unauthorized for employment or fail to comply with required employment eligibility verification requirements.
- Insure that HR team members responsible for the I-9 program are properly trained. Offer refresher training courses annually.
- Consider one of the commercial I-9 computerized compliance programs available to automate, as much as possible, I-9 completion, updating and retention. Some I-9 software providers also will audit and then digitize paper I-9 records, thereby addressing two error-prone areas at the same time.

²⁰ See, e.g., *United States of America v. Martin de la Rosa-Loera*, Criminal Complaint, United States District Court, Northern District of Iowa, Case Number 08-MJ-276, filed 07/03/2008, available at <http://www.eyeonagriprocessors.org/docs/US%20V.%20Martin%20De%20La%20Rosa-Loera.pdf>.

²¹ *Id.*

²² See "Plant official sentenced for hiring illegal immigrants," *Deseret News*, Nov. 14, 2008, available at <http://www.deseretnews.com/article/705262823/Plant-official-sentenced-for-hiring-illegal-immigrants.html>, and "Human resources director sentenced," *Daily Herald*, Nov. 13, 2008, available at http://www.heraldextra.com/news/local/article_c0d8c3df-ed04-5184-b4ee-4b9d72475487.html.

- Don't succumb to temptation to "help" a foreign national by cutting corners or looking the other way. There may be a legitimate solution for an employee whose documentation is called into question; if there isn't a solution for an undocumented worker, then the employment must be terminated.
- Consider adoption of some or all of the 12 "Best Hiring Practices" outlined in the ICE Mutual Agreement Between Government and Employers (IMAGE),²³ while recognizing that a one-size-fits-all approach may not be suitable for a particular employer's circumstances.
- Refrain from engaging in prohibited acts of immigration-related employment discrimination on the basis of national origin or citizenship status or by committing "document abuse" (asking an employee for more documents than minimally required or insisting on seeing a particular set of documents demonstrating identity and employment-eligibility, rather than allowing the employee to select which documents to present for inspection).²⁴

Despite the steady increase in recent years in criminal prosecutions in connection with worksite enforcement, criminal prosecutions of HR team members are still rare. Nonetheless, the fact that there have been any criminal prosecutions at all should put HR professionals on notice. Vigilance in I-9 compliance helps employers and also protects HR professionals from taking the fall for their employers.

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²³ Information on IMAGE is available from ICE at: www.ice.gov/partners/opaimage/.

²⁴ For additional information on the enforcement of immigration-related discrimination, see the website of The Office of Special Counsel for Immigration-Related Unfair Employment Practices, accessible at: www.justice.gov/crt/osc/.