

New Corporate Procurement Strategy: Minimizing Immigration Risks from Service Providers

By Angelo A. Paparelli and Ted J. Chiappari*

Ever since Cain's murder of Abel, philosophers, kings, clerics, law enforcement officials and other higher powers, more often than not, have urged a "yes" answer to the culpability-dodging question posed by Cain ("Am I my brother's keeper?").¹ In the world of U.S. immigration law, however, for roughly two decades after Congress enacted the Immigration Reform and Control Act of 1986 (IRCA),² received wisdom suggested the more prudent answer was "no."

As this article shows, the negative answer has morphed into the affirmative, at least for large companies heavily reliant on third-party service providers. As the government's enforcement efforts have moved fitfully ahead in recent years, some U.S. employers, hoping to avoid immigration liability, have taken more aggressive steps to mind the hiring practices of their fraternal business compatriots, namely, their vendors, contractors and subs, by requiring contractual assurances of immigration compliance, demanding third-party audits of vendors' immigration practices, and terminating service contracts with noncompliant providers.

How did yesterday's "no" become today's "yes"? IRCA heralded a comprehensive regime of employer responsibility and liability for the hiring of new workers who the employer knows lack the legal right of employment in the United States. It deputized employers to enforce federal immigration law by commanding that businesses examine a new hire's documents of identity and employment eligibility within three days of the start of work. If the job candidate presented one or more original documents that appeared genuine and related to the individual, then they passed federal muster and the worker could be lawfully employed (as long as the employer had no reason to believe the documents were false or the candidate was an imposter).³

***Angelo Paparelli** is a Partner of Seyfarth Shaw LLP in NY, Los Angeles and Irvine, CA. He serves as President of the Alliance of Business Immigration Lawyers (www.abil.com), a global network of 31 immigration law firms vetted for practice excellence and client service. Named the world's leading corporate immigration lawyer (2008, 2006 & 2005, International Who's Who of Business Lawyers) and a first-tier business immigration lawyer (2008, Chambers USA). Paparelli co-authors the New York Law Journal's "Immigration" column, writes a blog (www.nationofimmigrators.com), and serves as an expert witness/consultant on immigration to law firms and businesses.

¹ Genesis 4:9.

² Pub. L. 99-603, codified at 8 U.S.C. § 1324a, Immigration and Nationality Act (INA) § 274A. Additional workplace enforcement provisions were added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208.

³ INA § 274A(b)(1)(A); 8 U.S.C. § 1324a(b)(1)(A).

Although these requirements, at first blush, seemed clear, there remained the gaping loophole of contract labor. Learning from the failed experiences of European countries with employer-leveraged laws that set out to enforce foreign-worker hiring restrictions, the U.S. Congress attempted to close the loophole by prohibiting the use of a contract with a third party to evade the rule against the knowing employment of unauthorized employees. Section 274A(a)(4) of the Immigration and Nationality Act (INA) [8 U.S.C. § 1324a(a)(4)], provides that a business entity or individual “who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after [IRCA’s effective date], to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien . . . with respect to performing such labor, shall be considered to have hired the alien for employment” in violation of IRCA’s general ban on unauthorized employment.

In the two decades after IRCA’s enactment, however, this provision has not been vigorously enforced, and some contracting parties – aided at times by wordsmithing lawyers – took pains to MYOB (mind your own business), and thereby avoid gaining actual or constructive knowledge that the other parties to their company’s deals may be employing unauthorized workers.⁴ Employers who might have suspected that their vendors were using unauthorized workers nonetheless saw no upside to investigating whether the vendors followed the immigration law because of traditional principles of employment, payroll tax and contract law, according to which the contracting customer has no employer-employee relationship with the vendor’s staff. This reluctance to investigate the vendor’s workforce was bolstered by the doctrine of constructive knowledge, introduced by court interpretation⁵ and through agency rulemaking:

Constructive knowledge is knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition.⁶

This duty of inquiry and due diligence, accepted as reasonable by law-abiding users of third-party contingent labor, also invited abuse by some employers, who took a page from the U.S. military and adopted a “don’t ask, don’t tell” policy of vendor relations. Many corporate customers were certainly concerned about the proliferation of false documents and identity theft among the labor force in their industries but feared that a rigorous policing of a contractor’s workforce for immigration compliance might well lead to “too much information.” Such information would presumably require either removal of the contractor’s offending workers who lacked work permission and perhaps termination of the service agreement, thereby interrupting business operations, or liability and sanctions for violating INA § 274A(a)(4). Since the government’s enforcement strategy for the first 20 years after IRCA’s passage rarely included attempts to impose liability on corporate customers for using third-party contract labor not

⁴ See generally, Angelo A. Paparelli, “Yes, We Have No Employees: The U.S. Immigration Consequences of Corporate Outsourcing and Secondment,” 13 *Immigration Law Report* No. 16 (Aug. 15, 1994).

⁵ See, *Mester Manufacturing Co. v. INS*, 879 F.2d 561 (9th Cir. 1989), and *New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir.1991). Compare, *Collins Foods Int’l Inc. v. INS*, 948 F.2d 549 (9th Cir. 1991).

⁶ 8 CFR § 274a.1(l)(1).

authorized to work, companies had little incentive to give any thought at all to their vendors' staff's immigration status.

The tendency of those employers heavily reliant on third-party labor with potentially suspect immigration status to espouse the approach of Sgt. Schultz (the truth-avoidant character in the *Hogan's Heroes* TV show who regularly asserted, "I know nothing!") changed with the adoption in 2005 of a new federal immigration-enforcement strategy. In a highly publicized government settlement with a major company, involving no admission of liability, a federal court approved a consent decree requiring the employer to "establish as part of its [immigration] compliance programs a means to verify that independent contractors [retained by the company] are . . . taking reasonable steps to comply with immigration laws in their employment practices and cooperate truthfully with any investigation of these matters."⁷

In the aftermath of the 2005 consent decree, a pattern of contractual enforcement of IRCA has emerged, at least in certain industries. Today, the new mantra is MYOB² (mind your own brothers' businesses). Large U.S.-based companies, especially those with sophisticated vendor management systems, are increasingly using their economic bargaining power to mandate the inclusion of cram-down provisions in contracts with vendors and suppliers requiring full-throated representations, warranties and covenants attesting to immigration compliance by the contractor and each of its subs.⁸ These provisions typically include assurances, backed by threat of contract termination and indemnity for breach of warranties, that the vendor:

- Has complied, and must comply, with all U.S. immigration laws, statutes, rules, codes, orders and regulations,
- Has kept, and must keep, during the life of the contract and a set time thereafter, all Forms I-9 (Employment Eligibility Verifications) for employees assigned to work for the vendor at the customer's worksite, and must make and maintain copies of all documents confirming workers' employment eligibility and identity, and other required records,
- Must engage an outside auditor (an experienced immigration lawyer or consultant) who agrees to audit the contractor's immigration compliance and required I-9 recordkeeping, and then certify the results of the audit to the customer within as few as five days of any contractually authorized demand for audit made by the customer to the contractor either at random, or, in situations where the customer has reason to believe the vendor may have violated the immigration laws,

⁷ See Consent Decree and Order in *U.S. v. Wal-Mart Store, Inc.*, U.S. Dist. Ct., Middle Dist. PA, 1:CV-05-0525, Mar. 15, 2005, accessible at: www.nationofimmigrants.com/wp-content/uploads/2009/06/2005%20Consent_Decree_and_Order.pdf.

⁸ See, Richard A. Gump, Jr., "Corporate Compliance Practice Aids for the Immigration Lawyer - The Wal-Mart Model of Best Practices and Subcontractor Liability: Tools for the Embattled Employer," and Magdeline Momani, "Best Practices for IRCA Worksite Compliance in an Era of Increased Investigations and Enforcement Actions," published in The 2008 AILA Worksite Enforcement CLE Conference Workbook -- Cutting-Edge Issues in Worksite Compliance and Enforcement: Developments, Trends, and Practice Guidance (eds. Josie Gonzalez, Richard A. Gump, Jr., and Mary E. Pivec).

- Has responded, and must respond promptly, to any demand for inspection of the contractor's immigration records by the Department of Homeland Security (DHS), any other government agency or the outside auditor,
- Must immediately (usually, in an hour or less) notify the customer in writing and by face-to-face communication of any surprise inspections, work site enforcement actions, inquiries, visits, audits or investigations by DHS or any other governmental agency concerning any immigration compliance issues or concerns involving the contractor or its subcontractors and sub-subcontractors,
- Must set up an employment-eligibility verification program under which the contractor issues each of its employees working at the customer's facility a badge certifying that any employee of the contractor or of a downstream subcontractor assigned to a customer site and carrying the badge is authorized to work in the United States,
- Must develop and implement an immigration compliance plan under which the contractor sets forth its procedures for employment-eligibility verification, recordkeeping, and training of employees in I-9 procedures and immigration law requirements, as well as its agreement to allow training in immigration compliance by U.S. Customs & Immigration Enforcement (ICE) representatives and to enroll in E-Verify (the online verification program maintained jointly by the Social Security Administration and DHS), and
- Must agree to discharge or remove any employee assigned to the customer's facility who the customer reasonably believes lacks employment authorization, or, face unilateral termination of the contract by the customer.

Some observers might view these contract clauses as micro-management in the extreme. Others may worry that giving the customer so much power to direct and control the contractor and its employees may risk the imputation by courts or administrative tribunals that the customer, by virtue of its agreement and its over-stepping post-contract conduct, if any, has become a co-employer of the service-provider's employees. While these concerns are legitimate, so too are the fears of immigration backlash held by major corporations that have adopted sophisticated spend-management and vendor-management procurement policies and procedures in order to maximize value, minimize risk and delegate the provision of non-core business services to third party contractors, subs and vendors.

Corporations with substantial bargaining power in a dysphoric global economy face little difficulty in finding vendors willing to agree to extensive immigration-compliance provisions in contracts for services. Vendors, like any other employer with direct hires, certainly have reason to be proactive in complying with U.S. immigration laws, given the Obama administration's recently announced worksite enforcement strategy that focuses more on the criminal and civil prosecution of employers who violate immigration, employment and work-safety laws than on the removal of unauthorized workers.⁹ The new enforcement strategy, according to a June 16 speech by John Morton, the Assistant Secretary of DHS who heads ICE,

⁹ DHS April 30, 2009 Fact Sheet accessible at: www.ice.gov/doclib/pi/news/factsheets/worksite_strategy.pdf (all links in this article were last accessed on June 21, 2009).

will also “restart [ICE’s] . . . auditing and civil fine proceedings,” and “aggressively pursue” employers who fail to comply with the legal requirements for Form I-9 employment-eligibility verification.¹⁰ For now, the 2005 consent decree remains “the voice of one crying in the wilderness,”¹¹ given that no other federal court settlement or order has imposed a vendor policing requirement on a major company. While a number of representatives of corporate America have taken that voice to heart, it remains to be seen whether this approach will be incorporated into the government’s enforcement strategy or whether customers’ potential liability for service-provider immigration violations will be relegated to the bottom of lawyers’ due diligence checklists.

The vendor-policing approach may also gain new momentum if and when the Federal Acquisition Regulation (FAR) applicable to government contractors and their covered subsidiaries all the way down the provider food chain are required to use E-Verify beginning September 8, 2009 on all new hires and all current employees assigned to provide substantive services in support of a federal contract.¹²

Although the legitimacy of the FAR regulation mandating E-Verify use is now in litigation,¹³ the judicial outcome of the challenge may be of less significance than the trend in the world of corporate procurement to force-feed hard-to-swallow immigration-compliance obligations down the gullets of vendors and service providers. Regardless of the government’s enforcement strategies and practices in the coming years, corporate procurement officers will most likely continue to insist that service providers take pains to modify their internal protocols to achieve maximum adherence to the dictates of U.S. immigration law.

¹⁰ Speech of John Morton at the American Council for International Personnel Annual Symposium (notes on file with the authors). See also, Mark Schoeff, Jr., “Worksite Enforcement Official Wants to Work with Employers,” *Workforce Management*, June 17, 2009, accessible at: <http://www.workforce.com/section/00/article/26/48/96.php>. Under the Bush administration, civil I-9 enforcement proceedings had experienced a famine of biblical proportions, with virtually no published cases for a seven-year period. See, Angelo A. Paparelli and Ted J. Chiappari, “Homeland’s Outsourcing of Enforcement Gains Impetus,” *New York Law Journal, Immigration Column*, (Oct. 22, 2007) at 6 FN 4 (“[A]dministrative law judges in the Office of the Chief Administrative Hearing Officer . . . who hear civil immigration violations involving illegal employment are about as busy as the Maytag repairman. . . . [O]f the 66 published OCAHO decisions from 2000 to 2007, only two involved unlawful employment of aliens”). OCAHO cases from 2000 to 2007 can be found at: www.usdoj.gov/eoir/OcahoMain/publisheddecisions/Looseleaf/Volume9/vol9listforInternet.htm.

¹¹ Mark 1:3.

¹² The effective date of the E-Verify requirement for federal government contractors has been extended four times to allow the Obama administration time to review the regulation, which has been challenged in federal court. The FAR E-Verify rule was originally scheduled to be implemented on January 15, 2009. See, USCIS, “What’s New: Federal Contractor rule delayed until September 8, 2009,” accessible at: <http://tinyurl.com/yslx4b>. See generally, L. Batya Schwartz Ehrens & Angelo A. Paparelli, “Demystifying Federal Contractor Obligations,” published in *The Immigration Compliance Book*, (2009, ILW.COM, eds. Angelo A. Paparelli, L. Batya Schwartz Ehrens & Dan Siciliano).

¹³ See, Schwartz Ehrens and Paparelli, *supra*, FN 12.