Goldilocks' Lessons for Dealing With Bearish Immigration Police

U.S. Companies Threatened by Bearish Immigration Police

By Angelo A. Paparelli and Ted J. Chiappari*

Unlike the Three Bears of fairy tale fame who were shocked by Goldilocks' unexpected home invasion, most Americans these days keep their doors locked. The same cannot be said for our country. The "doors" of the U.S. – in particular, our southern and northern borders and our "internal border" – business worksites – have generated understandable frustration for citizens and legal residents who believe they are adversely affected by the presence of unauthorized immigrants. While U.S. immigration policy has generated angry polarization across the political spectrum, on one matter politicians of virtually every allegiance now agree: The federal government must crack down harder on businesses that flout immigration laws by employing unauthorized foreign workers.

The Obama Administration, virtually from the start, has dramatically raised the stakes for employers. It has pursued a strategy of "silent" raids – the practice of snow-flaking the employer community with administrative subpoenas ("notices of inspection") demanding the tender of required immigration-hiring records (the Form I-9, Employment Eligibility Verification and payroll reports). These are followed by relatively stiff fines for mere paperwork violations or, if employers are found to employ undocumented workers, government orders requiring the immediate termination of employees who lack work permits. The widespread firings of legions of unauthorized workers comes as no surprise. Probably the worst-kept "secret" in America is the nation's burgeoning, recession-resistant cottage industry specializing in identity theft and document forgery – an industry that should have been put out of business by the poorly implemented and largely ineffectual REAL ID Act of 2005 but remains alive and well.

The Administration also doubled down on worksite enforcement by finalizing a Bush era initiative requiring many federal contractors and subs to enroll in E-Verify, the ostensibly voluntary online work-screening software program jointly administered by the Department of Homeland Security (DHS) and the Social Security Administration. At the same time, Arizona and a host of state, regional and municipal governments have mandated E-Verify use as a supplement to I-9 compliance – an immigration-enforcement regimen which non-federal lawmakers hope will survive a preemption challenge in a case already argued and now awaiting decision by the Supreme Court.

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Not willing to be considered slackers, the Republican majority in the House recently held immigration committee hearings intended to lay the factual predicate for legislation that would mandate comprehensive E-Verify use by *all seven million U.S. employers*. Some proponents of E-Verify would even force employers to screen *everyone* now in the workforce, not just new hires (as regulations require, except as to current workers who also must be cleared through the online system if assigned to a federal contract).

On a parallel track, a Reagan-era arm of the Justice Department's Civil Rights Division – the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) – has continuously pressured employers to refrain from engaging in illegal discrimination on the basis of citizenship status or national origin. The OSC also punishes employers for "document abuse" – a wayward employer's insistence that new hires proffer more or different documents of identity and work authorization than minimally required to establish the right to work.

Employers are thus expected to maintain a "Goldilocks" immigration strategy of worksite compliance. The "strategy" consists of being neither too vigilant nor too lax in hiring and paperwork practices, which for the last 25 years of I-9 enforcement has usually turned out to be "just right," like the third bowl of porridge and Baby Bear's chair and bed.

Until recently, the Goldilocks approach at least worked reasonably well for large companies, since the government's enforcement focus tended to be elsewhere. Immigration enforcement has mostly targeted small-fry employers, mainly in industries with historically high levels of unauthorized employment. From the government's perspective, modestly-sized businesses have been comparatively easy pickings. Small firms have had fewer resources to create well-structured and robust compliance practices (and thus were vulnerable to often well-founded charges of paperwork errors and knowingly-unauthorized hirings), or to resist a full-court press by the Feds in an enforcement action or criminal prosecution. In weighing the certain costs of implementing a robust I-9 compliance program (additional HR and training staff, outside legal counsel, periodic internal audits and training sessions) against the hypothetical costs of a government investigation statistically not likely to happen, many companies gambled that they would not be hit by a government investigation.

The tide seems to be turning, however, with DHS now marshalling two ominously-titled offices as part of a fortified enforcement apparatus – (1) a new "Employment Compliance Inspection Center" (ECIC) staffed with an initial crew of 15 full-time I-9 auditors targeted toward the largest U.S. companies, and (2) the first-time use for worksite enforcement of counter-terrorism "Fusion Centers" created with federal money by state and local police authorities to centralize and analyze disparate streams and fragments of information pointing to potential immigration-related threats against the Homeland.

Since unauthorized immigrants made up about 5 % of the U.S. workforce in 2010, these enhanced federal and state enforcement resources will no doubt reap immigration-law violations aplenty in the coming months, in particular if the size of the government's I-9 inspection team is expanded. This in turn will surely lead to the attempted harvesting of anti-immigration political hay by legislators and bureaucrats alike. What may very well follow is a flurry of I-9 inspection notices, accompanied later by a hefty fine or

the disruption caused by an order for mass terminations, which in turn can predictably lead to brand damage, drops in stock prices, and RICO and class-action securities litigation, as near-term history has shown. Large companies, however, should not play Goldilocks lying down. They should develop and implement immediate plans to strengthen their defenses before the immigration police attack.

Here then are a series of actions that large (as well as small and medium-size) companies should consider adopting post-haste:

1. **Assess Immigration Compliance.** In the pre-Obama past, random audits of compliance practices, conducted by internal HR staff, seemed more than adequate. Today, however, a random, partial audit should be undertaken, if at all, merely as a pilot project to scope out the parameters of a comprehensive immigration-compliance review by independent outside auditors. A 100% audit should be conducted not by internal staff who may have mistakes or neglect to hide, but by experienced immigration lawyers, who can help establish a basis for attorney-client and work-product privileges when the government comes knocking. While such an audit will not eliminate the employer's liability for prior violations, it will give the employer an idea of the business's exposure and allow the employer to change practices to avoid future violations. Such an audit, followed by employer improvements in compliance, may also be used to argue for an amelioration of any monetary penalty imposed after a government investigation.

   The external audit should cover:

   a. paper-based or electronic I-9 practices;

   b. E-Verify enrollment and compliance;

   c. records retention and destruction practices;

   d. use of vendors for special needs or staff augmentation;

   e. potential co-employment liability;

   f. worker/independent-contractor (mis)classification;

   g. Social Security 'No-Match Notice' follow-up practices;

   h. interviews of management and supervisors about actual or constructive knowledge of immigration violations,

   i. procedures employed in the expansion of workforces through prior stock or asset acquisitions; and

   j. procurement of immigration benefits through labor certifications, labor condition applications, and attestations and sponsorship for work visas or green cards.

2. **Determine How Counsel Should Present the Audit Report.** A thoroughly detailed report of the outside auditor's findings – if they are later ignored by the employer, especially where possible criminal conduct is uncovered – could become damning evidence of wrongdoing that may have to be disclosed to the government under the crime-fraud exception to the attorney-client privilege. On the other hand, evidence that the employer proactively sought to identify and correct errors disclosed in an outside auditor's formal report may be helpful in mitigation of penalties and defense in the court of public opinion. The employer should therefore, before the audit report is documented, determine with counsel the optimal form (oral or written, detailed or general) of the auditor's report.

3. **Be Prepared for Fallout and Take Necessary Corrective Actions.** Pre-emptive correction of identified immigration violations will help establish an employer's good faith to government enforcers, which may also help to mitigate fines and win the hearts-and-minds battle in the print and digital media. Employers should anticipate, however, that an audit might lead to a loss of some segment of the workforce, and therefore arrange recruitment plans or place temporary staffing agencies at the ready. Employers may also choose to conduct the audit in successive phases or by worksite so that, if terminations or resignations must ensue, the disruption can be minimized. Assuming that no pending or threatened investigation or litigation-related discovery hold requires retention of documents, employers should also discard business records that need not by law be retained, e.g., under the retention rule (I-9s may be destroyed after three years from the date of hire or one year from the date of termination, whichever is later).

   In addition, employers should develop (and initial with the current date) any documents that should have been maintained, but which were not prepared when due, e.g., any public access files required to support H-1B (specialty occupation) work visa petitions. (Note that this curative measure does not guarantee mitigation of fines in the I-9 context and would also not work , e.g., in the creation of the audit file required under the Labor Department's PERM labor certification rules.) Employers should also make contemporaneously-noted corrections to correctable business records, again to demonstrate good faith and to begin the running of the five-year administrative limitations period on I-9 errors.

4. **Adopt and Enforce an Immigration Compliance Policy.** For those employers concerned that their workforce may include unauthorized workers, or for those already hit with a post-subpoena fine for I-9 violations, an immigration compliance policy is strongly recommended. The centerpiece of a compliance policy is a declaration that the employer is committed to fulfilling the mandates of immigration law by maintaining a business where only authorized workers are employed and no acts of unlawful discrimination are tolerated. This should be buttressed by a hotline through which suspected violations can be reported and then investigated under objectively fair and effective procedures. The policy should also add a new section to the employer's code of conduct under which active or passive violations of the immigration laws are treated as material breaches of behavior and are properly sanctioned, up to and including termination of employment. Moreover, the policy should provide for regular training of staff in I-9

and other immigration requirements, and annual re-audits of compliance conducted by outside auditors.

Employers may also wish to consider incorporating into the policy some, but not necessarily all, of the employer best practices offered by U.S. Immigration and Customs Enforcement (ICE) in its IMAGE program, which stands for the "ICE Mutual Agreement between Government and Employers." At least two of the IMAGE requirements (such as submission to an I-9 audit conducted by ICE, and the establishment of "a procedure to report to ICE credible information of suspected criminal misconduct in the employment eligibility verification process") seem to go too far, however, and may not be suitable for adoption by many employers in the absence of special circumstances.

5. **Place Controls on Employment-Based Immigration Sponsorship.** Employers should require business managers who want the enterprise to sponsor employees for work visas or green cards to offer a written justification, and establish that only designated company officials (e.g., in Human Resources, or above the Vice President level) may approve the request. In this way, decisions can be made that are more immune to charges of cronyism or improper discrimination in the selection of candidates for immigration benefits. Controls should also be imposed concerning the factual representations and claims made under penalty of perjury in immigration forms and supporting documents. For example, immigration petitions and applications often require attestations concerning the skills needed to perform in a particular job, the business necessity for job qualifications or requirements, the unavailability of U.S. workers to fill the job, and a host of other factual assertions. Increasingly, government immigration agencies are data-mining prior answers to such questions provided by the same employer in online forms, thereby gaining the ability to identify, investigate and perhaps prosecute material factual discrepancies between past and current assertions contained in immigration requests for benefits. Without proper controls, internal corporate due diligence concerning the current job requirements, business needs and prior representations made to the government is likely to be inadequate.

6. **Incorporate Immigration Protections in Vendor Contracts and Manage Vendor Performance and Conduct.** The economic recession placed strong pressures on businesses to reduce headcount and engage a variety of staffing and consulting firms in order to augment personnel or secure specialized services. Vendor violations of the immigration laws may place not only the contractor but also the corporate customer in danger, particularly if the facts of the customer/vendor relationship increase the risk that the government will treat the pairing as a co-employment situation. Moreover, the government is increasingly insisting – as a precondition to the grant of work visas for vendor personnel – that the customer attest to certain facts, such as the existence, nature and duration of the vendor contract, or allow posting of required notices on the customer's business premises where the customer's own employees can see and question or complain to the government about the statements asserted in the notice. Thus, a strong set of vendor immigration-compliance duties, coupled with appropriate indemnification of the customer for the vendor's immigration violations or derelictions, should be inserted into all of the customer's agreements with its various vendors and consultants. These should be buttressed by behavioral

restraints that prevent a finding of shared control over the vendor's personnel and a consequent finding of co-employment.

7. **Review and Strengthen Global Mobility Practices.** U.S. enterprises no longer do business solely on American soil. The globalization of trade in goods and services has created a concomitant need to dispatch personnel worldwide. Global transfers of employees also require consideration of a variety of other areas of legal concern such as the Foreign Corrupt Practices Act, the new United Kingdom anti-bribery legislation, taxation, employee benefits, employment laws, and conflicts of law, as well as European Union and national regulations relating to privacy and electronic-data transmission. These concerns, which routinely intersect with the immigration laws of the destination countries, make global migration compliance essential.

   Moreover, immigration violations and negative publicity arising in one country can lead to impaired relationships with a host of foreign governments and consumers. As a result, companies must develop appropriate centralized or regional controls over global mobility compliance practices and the procurement of work-related immigration benefits. Fortunately, they are aided in this effort by a growing list of law firms and lawyer alliances that can help project-manage these needs and offer solutions in virtually all of the world's nation-states to which employees are dispatched.

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As can be seen, when it comes to immigration legal compliance, U.S. companies can no longer nap like Goldilocks as bearish government enforcers are poised to pounce. Only by thoughtfully adopting proactive and defensive measures can U.S. businesses withstand the onslaught of the foreseeable immigration sanctions that are approaching.

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