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A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

JUNE 2006

Recent publicity surrounding arrests and prosecution of prominent business managers for immigration violations signals a real change in the immigration law enforcement posture. It is critical that employers appreciate that this change is real and where the new risks lie. This ASAP explains the change, the reasons for the change, and the steps employers should and should not take in response, including a review of how to handle employment-related questions arising from Social Security mismatch letters.

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Global Edition

A Littler Mendelson Newsletter specifically for the Global Industry

Immigration Raids Signal New Enforcement Emphasis by ICE

By Bonnie K. Gibson

In Indiana, the owner of a successful construction company is charged with harboring illegal aliens and faces 40 years in prison in Kentucky; four managers and executives of Fischer Homes, one of the nation's most successful home builders, are arrested for aiding, abetting and harboring illegal aliens—convictions could mean 10 years' imprisonment; in New York, seven current and former managers of IFCO Systems, the largest pallet manufacturer in the U.S., are arrested and charged with harboring illegal aliens for financial gain, and 1,187 IFCO employees are rounded up and charged with unlawful presence in the United States. Reports are widespread that more than half of IFCO's employees had invalid or mismatched social security numbers.

After years of benign neglect, do these highly publicized arrests and criminal charges signal a sea change within the Immigration and Customs Enforcement ("ICE") Division of DHS? Indeed, they appear to be a real harbinger of sustained and revitalized enforcement, because these efforts are win-win for the Bush administration: a show of force underscores that the government will no longer turn a blind eye to rampant disregard for the law prohibiting employment of unauthorized foreign nationals, while at the same time, the administration can send a strong signal to industries dependent on unskilled immigrant labor that now is the time—while the House and Senate try to hash out vastly different immigration reform bills—for business to raise its voice in Washington in support of legalization and guest workers, lest these employers, too, face a future dragnet.

Julie Myers, Assistant Secretary of DHS and head of ICE—a former federal prosecutor, is on a mission: in an opinion piece published in ***USA Today*** on April 25, 2006, she laid down her challenge to the employer community:

> We are expanding our focus on traditional worksite enforcement, but in non-traditional ways.... The most effective way [to enforce worksite regulations] is to bolster our criminal investigations against employers hiring illegal immigrants. For many employers, fines had become just another 'cost of doing business.' More robust criminal cases against unprincipled employers are a much more effective deterrent than fines.... We believe this is the future of worksite enforcement.

Because of threats to national security, ICE will continue its investigative and audit focus on critical infrastructure employers, but the recent arrests make clear that all employers could be at risk. ICE is looking for examples, there is a prosecutorial zeal in ICE offices throughout the country, and the price of getting caught is likely to include serious criminal charges.

In this environment, these are the things that prudent employers should—and should not do:

1. **Do not turn a blind eye to illegal workers.**

   Employers who follow the work authorization verification rules are not required to serve as *de facto* border agents and look behind facially valid

work authorization documents, so long as they have no reason to believe that employees lack work authorization. The recent spate of criminal charges have one thing in common: the government alleges that the company managers knew for sure that employees did not have work authorization and the companies continued to employ the workers anyway. Some of the managers provided transportation and housing after recruiting workers in other countries; others facilitated the workers' obtaining false documentation. In cases like these, the government can charge company managers, based on their knowledge about illegal status, with the felony of harboring illegal immigrants. A prudent employer should train managers and supervisors not to ask employees about their legal status—that is what the I-9 process is for, but to make sure that all supervisors and managers know to report employees' admissions or illegality or credible information that suggests workers are not authorized up the chain of command. This is true whether the known illegal workers are employed directly or by a subcontractor, as the immigration law prohibits both knowing employment and contracting of illegal labor. In the Fischer Homes case, many of the unauthorized workers were actually employees of the subcontractor.

When managers or human resources personnel learn of such reports, they must act on them. If the suspected illegals are direct employees, investigate the facts and terminate employment where the evidence warrants. If they are employed by contractors, follow up with the contractor and require the contractor to report back on action taken.

2. **Take I-9 obligations seriously.**

For many employers, the review of work authorization documents and confirmation of work eligibility is the only part of the new-hire process that is not fully automated. For some, this process has become a nuisance step, delegated to third party processors or to untrained clerical staff. An employer with a culture that requires rigorous I-9 compliance, a clear process for timely re-verification of temporary work authorization documents, and training for staff responsible for I-9 document authentication faces less risk of ICE scrutiny. Current law allows, but does not require, employers to maintain copies of the employee's work authorization documents. Keeping copies, according to ICE officers, demonstrates the diligence of the employer in the work authorization process, and, despite the discretion given to employers in the statute to copy or not, ICE strongly encourages employers to maintain copies. Conversely, however, in the event of government audit, copies can serve to demonstrate that the employer accepted phony documents or missed expiration dates of temporary authorization. Employers choosing to maintain copies must copy documents for all new employees.

For employers who host subcontractor employees at the work-site, the emphasis on I-9 compliance should extend to the underlying contractual documents, which should require certification from the subcontractor that the subcontractor does not knowingly hire or retain workers not authorized to work in the U.S. and that it completes and maintains I-9 forms for all workers coming onto the premises.

3. **Avoid over-documentation of work eligibility.**

Current law prohibits employers from asking for specific work authorization documents or from asking for more or different documentation than that specified by law. A summary of documents currently acceptable for work authorization is available on the ICE web-site. An employer should not look behind facially valid authorization documents in the I-9 process.

4. **Consider participation in the pilot social security verification program.**

All U.S. employers are eligible to participate in a program—Systematic Alien Verification for Entitlements (SAVE)--run by the Social Security Administration. SAVE provides an automatic check of the name and Social Security number of a new employee against the Social Security data base. ICE agents strongly encourage employers to enroll in SAVE. To enroll, employers must sign a memorandum of understanding with DHS. The memorandum prohibits the employer from using the SAVE program as a pre-hire screening device and requires the employer to check the Social Security number of each new employee and record a government authorization number, generated as part of the check, on the face of each new employee's I-9 form. The memorandum requires the employer to give employees whose information does not match SSA information 10 days' time to correct the data and allows for continued employment during the correction period. If the mismatch cannot be resolved, the memorandum contemplates that the employer will dismiss the employee, but does not specifically require termination. Rather, it requires the employer to notify the government that it has continued to employ an employee with a non-confirmation, creating a rebuttable presumption that the employer has employed an unauthorized worker. The data in the SAVE program is not fail-safe. There continue to be significant problems with the social security database, although there have been recent improvements. SAVE is particularly problematic for employers of legal immigrants, so participating in the program can complicate the new-hire process for employers who employ significant numbers of foreign nationals. As many as two-thirds of work-authorized non-immigrants may face tentative non-confirmation notifications. Fewer than 10,000 U.S. employers currently participate in SAVE. The system is available free, on a first come, first-served basis. Should participation in the program increase substantially, however, it will likely become oversubscribed and inaccessible. Information about SAVE employment verification

is available at http://www.uscis.gov/graphics/services/SAVE.htm#two

5. **Take social security mismatch notices seriously, but do not over-react.**

The new emphasis on enforcement revives questions about the best way to handle social security mismatch letters. Press reports about the recent arrests have highlighted charges that the affected employers had significant mismatch notifications and failed to act on them. The Social Security Administration does not volunteer information about mismatches to ICE. In the recent cases, ICE learned about the mismatch issues when it executed search warrants. Nonetheless, the fact that the employers' lackadaisical response to mismatch letters will be used as evidence in criminal proceedings is sobering. So what is the best response to mismatch notifications?

First, the mismatch notice is, by definition, not evidence of immigration status, so an employer should not take disciplinary action based solely on the mismatch. There are countless innocent mistakes that can lead to a mismatch—notably transposition of numbers or name changes.

The safest course for employers is initially to follow the process the Social Security Administration has laid out in its procedures manual for its staff. The manual suggests these steps:

- Look to see if the employer has a copy of the Social Security card and examine the number.
- Ask the employee to bring his card to work for the employer to check against the reported number.
- If the mismatch is not resolved by inspection, tell the employee to contact the local Social Security to try to rectify the problem.
- Give the employee reasonable time to obtain a replacement card or have the mismatch situation corrected—at least two weeks.
- Document efforts made to correct the number.

Unfortunately, the Social Security Administration gives no advice about what to do about the employee's employment if, after this process, there is still a mismatch, and there is no prescription that can fit every employer's business needs. Current law does not require an employer to terminate an employee who cannot solve a mismatch, but "under all the circumstances," an employer's knowledge about social security mismatches may become relevant in evaluating an employer's compliance with immigration laws. It is thus prudent for an employer to question the employee about the discrepancy and to weigh the credibility of the employee's response, as the employer would do in any workplace investigation. In addition, if the employee provides the employer with a new Social Security number, the employer should review employment records—typically the I-9 form and employment applications, to determine if the employee misrepresented information at the time of hire. The results of the investigation should be documented. So long as the employer takes these steps—and does not have other information suggesting that the employee is an unauthorized worker, Social Security mismatch problems will not lead to immigration law claims. Nonetheless, many employers may choose to terminate employees who cannot provide a credible explanation for the Social Security number discrepancy under honesty or employment record misrepresentation policies. Because of the risk of employment discrimination claims in this area of the law, it is important to be sure that the policy violation, and not the Social Security mismatch itself, is the reason for termination. Before enforcing such a policy, the employer should review past practices to ensure consistent, non-discriminatory application of its rules. The legal risks of a termination decision need to be assessed individually, especially if there is a collective bargaining agreement in place. In some states, the risk of a wrongful termination case, a union grievance or a union organizing effort may outweigh the risks of immigration violations, even under the new enforcement posture.

6. **Follow legislative developments carefully.**

The House and Senate have recently passed immigration reform measures, but the versions differ dramatically, so final legislation will require major compromise. The case for Congressional action to clarify employers' responsibilities is clear, but whether Congress can find a way out of the current stalemate in an election year is far less so. If an immigration bill ultimately is enacted, the odds are high that it will include mandatory electronic verification of employment eligibility, which could resolve much of the current verification dilemma. However, at a minimum, there will be a two-year phase-in before the system is up and running. In the meantime, taking the steps outlined here will help protect employers if the "ICE-man cometh."

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