

# Bloomberg Law Insights

## Immigration

### An Increase in Work Site Enforcement and Raids

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From his first foray into politics, Donald Trump has maintained a strong pro-enforcement stance on immigration. In June 2015, Trump announced his candidacy for president and delivered a speech railing against unfettered immigration and vowing to build a wall along the U.S.-Mexico border. Throughout his candidacy, Trump maintained his pro-enforcement stance on immigration. After serving as president for almost a year, increased immigration enforcement and a reduction in illegal entry into the United States remain among the Trump administration's highest priorities.

Acting Immigration and Customs Enforcement (ICE) Director Thomas Homan (recently nominated to serve as Director of ICE) has reportedly ordered Homeland Security Investigations (ICE's investigative arm) to increase its work site enforcement actions by "four or five times" in the new fiscal year. In the past, ICE conducted work site raids to arrest employees who lacked work authorization in the United States. Work site raids have already begun under this administration, and are expected to continue, aggressively targeting both employers and employees. Work site raids provide a high-profile opportunity for the Trump administration to show it is serious about enforcement efforts and deter workers who lack work authorization from working. For these reasons, it is time to prepare for this unique method of enforcement.

Under the Obama administration, ICE focused resources to an unprecedented degree on Form I-9 audits to ensure employers complied with technical Form I-9 requirements and that employees had work authorization. However, while the previous administration focused almost exclusively on employers, the new administration is likely to target both parties: employers that—even unknowingly—employ individuals without work authorization and employees who lack work authorization. In Homan's speech to the Heritage Foundation, a conservative think tank, in October, he noted in reference to immigrants unauthorized to work, "[A]s long as they think they can come here and get U.S. citizenship and not get removed, they're going to keep coming. As long as they can come here and get a job, they're going to try and come." Homan confirmed that ICE was planning on strongly prosecuting employers that hire those workers who are unauthorized to work, and that the agency would be making efforts to deport those same workers. Notably, Homan's confirmation of

ICE's increased enforcement came just after a court issued the largest fine ever levied in an immigration enforcement suit at \$95 million.

Although I-9 audits were down significantly, but steadily increasing, for the 2017 fiscal year, which ended September 30, 2017, Homan's announcements promise a sharp increase in enforcement efforts through this fiscal year and beyond. Through June 24, 2017, there were reportedly only 420 I-9 audits, compared with 1,279 for all of fiscal year 2016. I-9 audits hit a peak in the 2013 fiscal year, numbering 3,127. However, the numbers should not lessen employer concern over increased work site enforcement. Even before Homan's speech, the Trump administration had already implemented measures to increase ICE's ability to conduct I-9 audits. President Trump's "Buy American, Hire American" Executive Order issued in April 2017 directed the Secretary of State, Secretary of Labor, and Attorney General to implement measures to protect the interests of U.S. workers, including preventing fraud and abuse. The "Buy American, Hire American" directive also tasked the Department of Justice's Immigrant and Employee Rights Section with a new focus to ensure United States citizens are not discriminated against in favor of immigrant employees. In a previous executive order, "Enhancing Public Safety in the Interior of the United States," the Secretary of Homeland Security called for hiring an additional 10,000 ICE agents to focus on the enforcement measures outlined in the Order.

One method ICE may use to target both employers and employees is a Form I-9 audit followed by a work site raid. During the Form I-9 process, ICE, after reviewing an employer's Form I-9s, will issue an advisory known as a "Notice of Suspect Documents." The Notice of Suspect Documents informs an employer that it is employing individuals who likely lack work authorization, and instructs employers to take action regarding those employees who lack work authorization within a reasonable amount of time—usually understood as 10 days. Going forward, employers should prepare for a worksite ICE raid to accompany a "Notice of Suspect Documents." Work site raids were fairly common during the administration of George W. Bush, but they fell out of favor during the Obama administration. This will serve to fulfill the administration's goals of (1) deterring employers from employing individuals without work authorization and (2) preventing employees without work authorization from obtaining employment in the United States.

With the increase in immigration enforcement and work site raids, as well as the promise to prosecute those employers who hire unauthorized workers, it is very important for employers to understand that 8 U.S.C. § 1324A or Section 274A (“Unlawful Employment of Aliens”) of the Immigration and Nationality Act (INA) provides for several serious consequences for the company’s failure to properly maintain I-9 documentation.

Employers should first be aware of the increase in fines for I-9 deficiencies. In 2016, the Department of Homeland Security nearly doubled the range of fines for a first I-9 paperwork violation. Previously ranging from \$110 to \$1,100, on Aug. 1, 2016, the fines were increased to between \$216 and \$2,126. By February 2017, the fines were between \$220 and \$2,191 due to annual inflation adjustment, for each deficient I-9. The Department of Homeland Security also increased the fines for knowingly hiring unauthorized workers. Previously, the fines ranged between \$375 and \$3,200 per worker for a first offense. Effective Aug. 1, 2016, the fines were increased to between \$539 and \$4,313. As of Feb. 3, 2017, inflation adjustments raised the fines again to between \$548 and \$4,384 per unauthorized worker for a first offense. If the company is determined to have knowledge of any employee’s lack of employment authorization (including through willful disregard of information furnished by other government agencies) and continues to employ them, there are enhanced penalties for each unauthorized employment. Just this past year there has been a noticeable increase in fines, some even in the millions of dollars.

Most importantly, if a company is deemed to engage in a pattern or practice of violations in hiring or continuing to employ unauthorized aliens, the hiring personnel and managers with knowledge could be subject to criminal penalties including imprisonment for up to six months, and civil penalties as expressed above, for each unauthorized alien. The criminal and civil penalties are in addition to any paperwork violations. Further, there are criminal violations that may apply in the United States Code for harboring that may expose an individual to up to five years in prison. Penalty enhancements may apply for knowingly or in reckless disregard concealing, harboring, or shielding from detection, or attempting to conceal, harbor, or shield from detection an undocumented worker that has come to, entered, or remains in the United States in violation of law.

Knowledge under the INA is based on not just actual but also constructive knowledge. Constructive knowledge occurs when an employer has willfully disregarded to ascertain employment eligibility, particularly where the industry is one where unauthorized employees are common. One way to understand when constructive knowledge occurs is when an employer should have known an employee was unauthorized. Thus, constructive knowledge may begin when an employer receives a mismatch notice from a benefits provider or the Social Security Administration and decides to ignore it. However, it is important to keep in mind that the INA also prohibits against discrimination based on immigration status. Thus, for example, an employer should not assume an employee is unauthorized to work if a benefits provider says the employee’s name and Social Se-

curity number do not match. Instead, an employer should do its due diligence to determine what caused the mismatch. In a mismatch situation, an employer may be violating the INA either by doing nothing or by assuming the employee lacks status.

It is also likely work site raids will return under the Trump administration. As previously noted, the Bush administration conducted several high profile work site raids, but the Obama administration stopped the practice. Work site raids bring many serious concerns for employers, including: workforce shortages, public-relations issues, a decrease in employee morale, and company operational and liability concerns. Recent examples of enforcement actions undertaken by ICE include:

- Court-imposed supervised release and probation for three owners and a night manager of a restaurant for unlawfully employing unauthorized workers;
- 48 months’ imprisonment for a convenience store manager who employed and harbored unauthorized workers and provided them with stolen identities; and
- A food manufacturer paying \$1.5 million per settlement agreement after an ICE work site probe uncovered hiring violations.

With the administration’s enhanced focus on work site enforcement, now is the time to prepare for work site raids. Employers should consider implementing the following measures to protect the company’s workforce and limit liability:

1. Designating points-of-contact should an ICE audit and/or raid occur, and having a clear plan of action in the event of an audit and/or raid;
2. Familiarizing managers and other employees with the limits of ICE warrants, including the difference between administrative warrants and those signed by judges;
3. Preparing communications for both employees and the general public to address morale and public relations concerns;
4. Creating a uniform process to manage the public relations aspects of ICE interventions; and
5. Dedicating time to ensuring Form I-9 compliance, including performing I-9 audits both internally and by a third party, training employees responsible for completing Forms I-9 and providing them with yearly, recurrent trainings/refreshers, having a written I-9 policy in accordance with existing immigration laws and I-9 completion regulations, and clearly outlining hiring/firing procedures to include ensuring an understanding of anti-discrimination and other prohibited practices.

As immigration enforcement and removal efforts continue to rise, it is increasingly important that employers take serious measures to implement immigration compliance programs and procedures. With proper planning, employers can limit liability and protect from what could be dire consequences of an ICE audit and/or raid.

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