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Despite Recent Publicity Surrounding Wal-Mart's Alleged Immigration Violations, the Law Remains Clear That an Employer Is Not Liable for the Illegal Activity of Its Subcontractors Unless the Evidence Shows Some Involvement by the Employer in the Illegal Activity.

EMPLOYER LIABILITY FOR IMMIGRATION VIOLATIONS OF SUBCONTRACTORS: THE DEPARTMENT OF HOMELAND SECURITY CHALLENGES WAL-MART

By Roxana Bacon, Diane Dear and Christopher DiGiorgio

News accounts of immigration violations by Wal-Mart's subcontractor have raised questions by other employers as to their obligations and exposure under United States immigration laws. This guideline is intended to assist employers understanding of the law regarding employment of unauthorized foreign nationals and shape their own policies to ensure compliance.

THE "WAL-MART" ISSUE

Based upon newspaper reports, Wal-Mart outsourced to a company whose employees included some people in the United States without valid work authorization. The news accounts do not include all the important information, so the simple fact of Wal-Mart's subcontractor being audited and found failing by the Department of Homeland Security's immigration law enforcement arm is not useful in evaluating whether any other company need be concerned.

However, as a follow-up, a number of the employees who were detained have filed a lawsuit alleging that they were moved from Wal-Mart's actual employment to the subcontractor precisely because they did not have evidence of work authorization. In other words, the plaintiffs in the lawsuit allege that Wal-Mart was trying to shield itself from liability by using a subcontractor as an arm of its direct employment. If true, Wal-Mart cannot defend itself on the basis of not being the employer of unauthorized workers, because its conduct was consistent with being an employer, not with being an arms-length contractor of third-party services.

THE IMMIGRATION LAW'S REQUIREMENTS

The Immigration Act requires an employer to complete and maintain a properly executed I-9 form as evidence that its employees have work authorization. The I-9 form itself is the only evidence the employer needs to comply with the law IF:

- The I-9 form is completed in the right way, at the right time [at time of hire, and with proper identification of the employee].
- The documents, which only the employee may select from a list of options pre-approved by the Federal government, are "valid on their face."
- "Valid on their face" means that there is nothing obvious about the document that would cause an employer to question its authenticity. The test does not require the employer to be an expert or to make inquiries.
- The employer does not have actual knowledge or constructive knowledge of the employee's lack of work authorization. Actual knowledge is not rumor or

supposition. It must be information that would "lead a person exercising reasonable care to acquire the critical fact or knowledge." A "mis-match" social security number does not constitute "constructive knowledge," but failure to reverify a temporary work visa that requires the employer's sponsorship would.

- The I-9 forms are retained as required by the regulations, i.e., at the employer's business and for 1 year after termination or 3 years from the date of hire, whichever occurs later.

AN EMPLOYER EXCEEDS ITS STATUTORY ROLE UNDER THE IMMIGRATION ACT AT ITS PERIL

The prohibition against the employer asking an employee for certain identification documents or from investigating beyond a facially valid document is rooted in the Immigration Act's anti-discrimination provisions. In addition to sanctioning employers for knowingly hiring unauthorized workers, the law punishes employers for discriminating against applicants on the basis of their immigration status if they are U.S. citizens or lawfully admitted permanent residents ["green card" holders] or have been admitted as asylees or refugees.

The danger of going after a subcontractor's employees is dual, then. First, since the Act only allows the I-9 form to be requested by the employer, dictating a subcontractor's I-9 process exceeds the employer's authority. Any damage a subcontractor's employee might suffer would invite liability. Second, dictating a subcontractor's employment practices breaches the wall that should exist between the two entities precisely so that there is no co-employment relationship, opening the employer up to any and all employment-based claims from the subcontractor's employees or from the myriad employment law enforcement agencies.

WHAT TO DO

Be certain that its own employees' I-9 forms are in order. An internal audit should occur regularly, and any paperwork errors corrected. Note that corrections are encouraged under the Immigration Act, but they need to be initialed and dated as of the date of the correction.

A client should be certain that it has written contracts with subcontractors.

A client's contracts should include language that clearly places all responsibility for Immigration Act compliance by the subcontractor and its employees on the subcontractor.

We recommend that the language specifically mention that the subcontractor verifies it will comply with the Immigration Act's I-9 requirements, both substantive and clerical. The penalty for non-compliance should include the client's right to terminate the contract.

In addition, the client should indemnify itself from any liability and/or financial obligations arising from the subcontractor's violations of immigration-related laws.

WHAT NOT TO DO

Basically, the client needs to keep its business clearly separate from the subcontractor's business. Specific suggestions include:

- Do not review the subcontractor's I-9s.
- Do not engage in any conduct with the subcontractor, which might give rise to a claim of joint employment. Payrolls, tools, benefits, policies: all should be separated between the client and the subcontractor.
- Do not mix employees. If the client decides to hire from the subcontractor's work force, the candidate should be treated the same as any other applicant, completing application forms, being interviewed, and completing a new I-9 form.

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