

PUBLICATION

Employers Should Prepare for Immigration Raids

Authors: Robert C. Divine, Matthew Scott Chester
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It's no secret that President-Elect Donald Trump has intentions to carry out what he has called the largest mass deportation in U.S. history shortly after taking office.

U.S. employers, particularly those in the manufacturing, food processing, agricultural, construction, and hospitality industries with a relatively unskilled workforce, should immediately prepare for long-absent government immigration enforcement in the workplace. Get ready to endure a painful process, a sudden loss of workers, and administrative and criminal penalties.

Most employers with a substantial non-professional workforce have accumulated workers who may be unauthorized to be in the U.S., whether they entered the country undocumented or overstayed. Employers have been required since 1986 to check the documents of new hires to confirm their identity and work authorization in completing Form I-9, but those documents are easily faked. Increasingly many employers have opted or have been required to use the government's electronic E-Verify system, which performs real-time validation against governmental systems, but readily available counterfeit documents embodying the stolen identities of real citizens or permanent residents will validate in E-Verify. So even law-abiding employers are at risk of enforcement actions.

Few employers have knowingly brought in illegal workers, but many may have "turned a blind eye" to indications that something is wrong: social security or tax notifications of "mismatches" in payroll-related filings, health insurer notifications of multiple persons using the same identity, calls from identity theft victims complaining of the misuse, or a pattern of workers presenting state identity cards from the same far-off state. Over time, lower and mid-level managers may have learned that key workers are, in fact, unauthorized or that key referrers are using questionable channels for recruiting. But even perfectly innocent employers at least face the risk of a sudden loss of workers following a government raid.

I-9 Audits: The Silent Raid

The Department of Homeland Security (DHS) has the authority to appear at a worksite with a Notice of Inspection and/or subpoena and demand production within three days of historical lists of workers with dates of hire and termination, payroll and tax records, company ownership information, staffing vendor information, all I-9 forms required to be on file, and any copies of identity and authorization documents presented by employees. Immigration and Customs Enforcement (ICE) will have an expanding national team to inspect these documents.

One problem arising from an audit can be ICE sanctions for incorrectly completed forms, for missing forms, and even for "knowingly hiring" unauthorized workers (often a conclusion from "constructive knowledge" evidence). Sanctions can range from \$300 to \$30,000 per worker, plus debarment from federal contracts, and are often disputed. Employers get ten days to correct "technical" errors, but ICE takes an expansive view of what counts as "substantive" errors that can't be corrected to avoid penalties. ICE can fine employers for failure to comply with very technical requirements for electronic storage of completed forms.

An even bigger problem can result from an ICE finding of "Suspect Documents" about workers ICE believes are unauthorized based on its own database checks, even if the I-9 was completed correctly. The employer must contest the finding as to particular workers or terminate them, and ICE normally leaves little time for this critical resolution. Unfortunately, ICE is rarely wrong about suspect documents, and even confronting the worker about the ICE finding often results in the worker failing to show up for work again. Thus, ICE's "silent raid" on a workforce is accomplished, crippling the employer's ability to meet production.

Raid with Force

DHS sometimes independently finds evidence of large-scale employment of unauthorized workers and investigates further, even planting undercover agents into the workforce. Then, suddenly and without warning, DHS shows up in force with dozens of armed agents, search and seizure warrants, and buses, blocking all gates. Rather than request documents, DHS will seize them, including computers and phones, and will arrest unauthorized workers and take them away for deportation or even prosecution.

The sudden loss of workers, files, and technology can absolutely cripple a business. Sometimes the government prosecutes employer owners and managers on charges including "harboring" and trafficking unauthorized workers, mail and wire fraud, document fraud, and tax evasion. Criminal charges for harboring aliens (or other, related criminal charges such as committing fraud on immigration documents) can run potentially into the hundreds of thousands of dollars and, if convicted of such offenses, can result in imprisonment.

Preparation for Raids

Employers should consider the following actions to prepare for silent or loud workforce raids:

- Make sure I-9 verification, storage, and destruction are being handled meticulously at all sites.
- Internally audit I-9s to find and fix patterns of errors.
- Enroll in E-Verify.
- Pay workers and submit tax withholding payments properly.
- Evaluate recruiting patterns to detect systematic improprieties.
- Prepare an immigration component to the employer's legal compliance policy.
- Identify coordinators for response to raids and game out scenarios with counsel experienced with raids and criminal processes.

Our Services

Baker Donelson has longstanding experience with some of the largest workplace raids and associated prosecutions in the U.S. We have immigration and criminal defense lawyers having high-level government experience. We are prepared to assist with the preparatory steps listed above and others that may be warranted as well as to assist under pressure when a raid actually occurs.