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Executive Orders on Immigration: How Employers Can Prepare for Increased Enforcement Actions

02.28.17

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Recent press reports describe worksite raids and other types of enforcement action by U.S. immigration authorities, illustrating the new immigration reality introduced by the Trump Administration. Employers have taken notice and should begin taking steps to prepare for heightened government scrutiny of their employment practices. Recent Trump Administration guidance foreshadows a new order of tougher enforcement which could be disruptive for operations and work environments. This advisory describes the three major types of worksite-focused enforcement actions: (1) worksite raids; (2) H-1B and L-1 worksite visits; and (3) Form I-9 investigations and how to prepare for each.

While the most newsworthy of President Trump's three January 2017 Executive Orders ("EOs") imposing a travel ban on nationals of certain countries has been temporarily enjoined by the Federal Courts, the two other EOs, which pertain to immigration enforcement, remain in place. On February 21, 2017, Department of Homeland Security ("DHS") Secretary John Kelly signed two memoranda to implement these enforcement-related EOs. The key elements of the memos include: expanded enforcement targets (directed at undocumented people), the hiring of 10,000 new Immigration and Customs Enforcement ("ICE") agents and 5,000 additional border patrol agents, and an expanded program of expedited removal for undocumented aliens who cannot prove that they have been residing in the U.S. without interruption for the past two years. While the memos do not expressly address new worksite initiatives, their generalized focus on enforcement provides a signal to employers to anticipate heightened DHS scrutiny in the form of worksite raids and compliance investigations.

The three most likely forms of DHS enforcement actions that employers could face are (1) worksite raids; (2) H-1B and L-1 worksite visits; and (3) Form I-9 investigations. Included below is a discussion of how employers can prepare themselves to face DHS enforcement and what, if anything they might do to assist employees who are caught up in the process. There are no quick and simple answers in the current context, and the proper course of action depends on the nature of an employer's business as well as the number and types of employees involved. Employers in industries that have been targeted for immigration enforcement actions in the past (i.e., restaurants, food processors, high-tech manufacturers, the agriculture sector), and others that rely on a lesser skilled workforce, likely face the highest enforcement risks.

ICE Worksite Raids

The first category of likely enforcement actions, Worksite Raids by ICE, has received the

most attention recently. The purpose of an ICE raid is to check whether the employer is knowingly or unknowingly employing unauthorized aliens. Generally, ICE will have received word from a disgruntled employee that the employer is hiring unauthorized aliens, and will present a search warrant signed by a federal judge or magistrate prior to searching the premises for unauthorized aliens. (Note, however, that if the worksite is considered a "public place," ICE may not need a judicial warrant to conduct a search.) Whether initiated with or without a judicial warrant, such raids are made without any prior notice to the employer or employees, and often culminate in the arrest and detention of numerous individuals. In the event of a worksite raid, an employer should contact an immigration attorney immediately and try to ensure that the search is limited to the scope of the warrant (e.g., only at the specific worksite named in the warrant, rather than at all of the employer's various work sites). The employer should not try to hide or otherwise help employees to avoid arrest and detention, or the employer may face charges for harboring unauthorized aliens, in addition to any unauthorized employment-related charges. Employers may, however, assist their employees indirectly by disseminating resources including "know your rights" flyers and emergency preparation kits such as powers of attorney enabling friends or relatives to care for children who might remain in the U.S. if parents are deported. Such resources should be disseminated broadly rather than given to specific employees as employers must remember that (1) they may not knowingly hire or continue to employ an unauthorized alien; (2) they must terminate an employee if they know (or have reason to know) that the employee is not authorized to work in the U.S.; (3) they must not harbor or assist unauthorized aliens to remain undetected by ICE; and (4) they (and their managers) can be subject to civil and criminal penalties (including jail in extreme cases) for violations of these rules.

USCIS H-1B and L-1 Worksite Visits

The second category of likely enforcement actions are the H-1B and L-1 site visits by U.S. Citizenship and Immigration Services ("USCIS"). H-1B visas are for aliens who work in professional or other specialty occupations. L-1 visas are for executives, managers and other specialized knowledge employees who are transferred from a foreign affiliate to work for a U.S. company. The purpose of these worksite visits is for the USCIS fraud unit to check whether H-1B and L-1 workers are doing the job that the employer described on their work visa petition filed with USCIS. A USCIS fraud investigator will often come to the employer's place of business unannounced and ask to speak with the foreign worker, the person who signed the petition, and the foreign worker's supervisor. The investigator may ask questions about the foreign worker's job title, salary, job duties, hours, and work location. If the individuals in question are not available, USCIS may follow up by telephone and email. Generally, an employer that has L-1 and H-1B employees should be prepared to confirm the details of the foreign worker's job in a manner consistent with the documents filed with USCIS. If the USCIS fraud investigator is not satisfied with what he or she learns through the site visit, an employer may face the consequence of receiving a Notice of Intent to Revoke the employee's work authorization. In addition, USCIS may share information that it learns through its visits to ICE (which might lead to civil or criminal penalties) or the U.S. Department of Labor (which might lead to H-1B program debarment company-wide).

The best preparation for such a site visit is to ensure that the foreign employee, his or her

supervisor, and one or more human resources staff on site are familiar with the description of the job and job duties contained in each petition filed with USCIS on behalf of each current employee, and that the petition documents accurately reflect the terms and conditions of the employee's job as currently performed. Before changes are made to an H-1B or L-1 employee's role with the company (e.g., job title, duties, work location), the employer should always check with its immigration lawyer to determine whether an amendment should be filed with USCIS first. In addition, the employer should verify that all documents that are required to be retained for a foreign worker, such as the Labor Condition Application, are available and up-to-date.

ICE Form I-9 Investigations

The third category of likely enforcement actions, the ICE Form I-9 investigation, is distinguished by the fact that an employer will be given at least some advance notice before facing government scrutiny. The Form I-9 is used to verify the identity and employment authorization of a newly hired worker, and all employers have been required to maintain I-9 forms for all workers hired after November 6, 1986. Employers are required to retain I-9 forms for all current employees as well as forms for terminated employees at least one year from their date of termination date or three years from their date of hire, whichever is the latest date.

The task of a Form I-9 investigation is for ICE to identify whether an employer has properly completed and retained I-9 forms. Upon receiving an ICE Notice of Inspection, the employer will be given at least 3 days to turn over its forms to ICE along with related payroll and business records. The employer should contact an immigration lawyer immediately upon receiving a Notice of Inspection and request that the attorney review all requested I-9 forms before they are turned over to ICE. An immigration attorney will assist the employer, to the extent possible, to correct identified errors to mitigate, and in some instances, to completely avoid, costly civil fines.

Because of the technical nature of the Form I-9, most employers make completion mistakes and many of these mistakes can lead to costly civil penalties. The best preparation for a Form I-9 Investigation is to engage in regular and periodic internal I-9 audits with the guidance of immigration counsel. During such internal audits, employers will identify and correct completion and retention errors. In addition, employers should regularly review and tighten their Form I-9 procedures and policies. This involves (1) maintaining a reminder system which will alert the employer of the need to reverify the work authorization for those individuals who have expiring work authorization; (2) determining whether the company will adopt an "honesty policy" regarding an employee's provision of false information or documents related to employment (if such a policy is adopted, it must be done in accordance with state law and applied consistently); (3) promptly addressing employee data mismatch notices received from the Social Security Administration, Internal Revenue Service, and other parties with assistance of legal counsel; (4) signing up for USCIS's Form I-9 alerts and participating in the agency's free training programs; and (5) considering participation in E-Verify, the Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States.

If you have any questions, please do not hesitate to contact the immigration lawyers at Davis Wright Tremaine LLP.

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