

PREFACE

Much criticism has been levied over the inadequacies of the Immigration Reform and Control Act of 1986. The goals of this legislation were laudable: legalize the pool of undocumented workers who entered the United States before January 1, 1982, and enlist the assistance of employers to screen their workforce to ensure that all workers had the right to lawfully work in the United States. Over the next 20 years, employers were told to accept work authorization documents that reasonably appeared to be genuine and record related data on a new form, the “I-9,” that had to be retained for possible inspection by the government. Employers were not asked to mail the I-9s to the government to verify the accuracy of the data accepted, nor, until just recently, were they given the tools to decipher a valid document from a forged one. It should come as no surprise that many employers viewed this effort as a toothless and ineffective enforcement measure, with the result that today there are many workforces that are comprised largely of unauthorized workers. Weaning America’s employers from their undocumented workforces is no easy task. Special relationships—emotional and economic—have developed between employers and their workers. There is no more important asset to a company than its trained labor pool. Lacking adequate measures to apply for work permits to legalize their foreign talent, employers are sitting on a keg of dynamite—waiting with tremor for the ICE-man (Immigration and Customs Enforcement) to cometh.

Without the passage of any new legislation, the Department of Homeland Security (DHS) decided approximately three years ago that it would use existing statutes to pursue criminal prosecutions of employers for conduct that in prior years was either largely ignored or was punished through civil penalties. Vigorous enforcement is resulting in multimillion-dollar fines and prison sentences for corporate executives, managers, and lower-level supervisors. The highly publicized prosecutions by DHS are designed to inculcate in the minds of employers that a new zero-tolerance landscape is in place and that the climate of “willful blindness” to the “real” composition of the workforce will not be tolerated.

The unfortunate group of employers caught in DHS’s prosecutorial net had no idea that the government’s prior laissez-faire attitude regarding an employer’s immigration responsibilities had abruptly changed. These employers and many more fail to realize that fulfilling their immigration obligations requires far more than the mere completion of the I-9.

Although the government often describes the conduct of the employers it has prosecuted as “egregious, shocking, and willful,” a close examination of the underlying indictment documents reveals that what is “egregious” is clearly in the mind of the beholder: the government. Certainly, not all employers were evildoers who blatantly violated the law. Had adequate education, corporate controls, and compliance measures been instituted, a criminal prosecution for some could have been avoided. For example, take the case of Mel Kay, the chief executive officer of Golden State Fence, who was criminally prosecuted in San Diego for hiring 10 or more unauthorized aliens within a 12-month period. At sentencing, Judge Moskowitz stated:

Of most significant interest in reviewing this case is the fact that the case agent, that is, the government agent, found that none of the undocumented workers had been exploited by Kay and/or his corporation. In fact, the undocumented workers were paid well and had health and employee benefits. They were not treated as day laborers, but were permanent, longstanding, and loyal employees. When he had to terminate his undocumented workers, Kay provided them with their last due paychecks as well as severance pay. It's hard to image that there are other companies or employers out there who would treat their undocumented employees as fairly as their eligible employees such as Kay did, and I think that is an accurate statement of the fact here.

The U.S. attorney acknowledged that there was no evidence of Mr. Kay's direct knowledge of any criminal conduct. Mr. Kay paid a high price, not for participating in any criminal conduct, but simply for tolerating it and failing to adopt appropriate safeguards as the company's highest executive officer. Mr. Kay's minimal culpability and the corporation's subsequent rehabilitative measures contributed to the court's decision not to impose any jail time. Judge Moskowitz credited the company's efforts, saying that it "obtained expert legal advice and devised an A plus system for dealing with the situation to essentially clean up their act and make their act a model for what corporations in the construction field should do to avoid hiring illegal aliens."

The need to heighten employer awareness and to provide enhanced, practical education was the catalyst for this publication. Our authors have sought to provide a balanced, comprehensive tool that will inform employers about their legal obligations and their due process rights. Much of the material is focused on assisting employers in developing effective immigration corporate compliance policies that will avert civil and criminal liability.

This book begins with articles that trace the history of worksite enforcement and provide an excellent overview of all of an employer's responsibilities. Roger Tsai's introductory article provides a comprehensive summary of the shift from civil to criminal prosecution of employers.

Next is an article analyzing the complex ethical issues in the representation of employers in a worksite enforcement setting. Issues such as obstruction of justice, document retention requirements, conducting internal investigations, and conflict of interest dilemmas in representing the corporation, its managers, and the workforce are discussed.

Two articles are contributed by criminal defense attorneys, who describe the criminal penalties that can attach to specific employer conduct. The article authored by Jay Jorgensen, Thomas Green, and Ileana Ciobanu describes their successful representation of Tyson Foods. It discusses key defenses available to companies facing criminal investigations and suggests ways that they can avoid becoming targets of government prosecutions.

Several articles focus on one of ICE's most effective enforcement tools—the dreaded worksite raid. These articles demystify this enforcement tool by describing how the

government conducts its investigations, the profile of the targeted company, and what occurs during a raid, including what due process rights an employer and worker can invoke.

Daniel Brown has contributed an article that describes the Social Security “no-match” regulations and related litigation. Although at the time of writing there was no final resolution concerning the injunction preventing the government from implementing the “no-match” regulations, Brown’s analysis provides an insightful roadmap for companies to follow in the absence of definitive guidance.

Four articles address instituting corporate immigration compliance measures that should foster a climate of immigration awareness regarding the government’s new zero-tolerance stance toward the employment of unauthorized workers. We provide a thorough nuts and bolts approach—including instituting defensive measures such as participating in DHS’s E-Verify new-hire screening, IMAGE, or I-9 electronic programs; conducting I-9 internal audits with full awareness of antidiscrimination responsibilities; and the need for conducting I-9 due diligence stemming from corporate mergers and acquisitions.

Tony Weigel and Nancy-Jo Merritt have written an excellent article on various state immigration laws promulgated throughout the United States, aptly called “The Mushroom Patch of State Immigration Laws—A Mad Hatter’s Wonderland for Employers.”

When you think it’s over, it isn’t. In her article on the Racketeer Influenced and Corrupt Organizations Act, Mary Pivec describes the continued focus on the employer’s hiring practices from civil litigants who press claims against employers for alleged racketeering activity such as harboring and transporting undocumented aliens. Notwithstanding a criminal conviction, domestic workers and businesses can sue to recover actual and treble damages and attorney’s fees and costs.

The second section of the book provides a panoply of practice aids to assist the employer in the development of immigration corporate compliance measures. Rick Gump leads off by providing a PowerPoint presentation and other materials related to subcontractor liability using the “Wal-Mart Model of Best Practices” as a guide. Other helpful Power Points are contributed by Mary Pivec, Kathleen Walker, and me on the topics of criminal and civil liability, the Social Security “no-match” letter, and the newly revised I-9. I have also included an article full of practice pointers in conducting investigations after ICE worksite raids.

Assistant Secretary of Homeland Security for ICE Julie Myers recently announced a new shift in enforcement tactics and an increase in I-9 worksite audits. In order to prepare the employer for these inspections, I have provided a wealth of information on the representation of employers facing I-9 government inspections, including how to respond to ICE subpoenas, how to conduct internal investigations with sample questions for the hiring manager and corporate executives, instructions for surrendering ICE requested data, and guidance on how to correct I-9s. Sample ICE notices of inspection and related documents are included.

The last section of the book provides valuable resource materials such as the latest DHS *Handbook for Employers*, E-Verify fact sheets, and various criminal indictments.

In conclusion, there will continue to be many interesting and emotionally charged developments in the area of worksite enforcement. Government tactics are ever changing.

Today, the government focuses on immigration-related prosecutions. Perhaps in the future there will be a shift to deferred prosecution agreements, which are now being used to redefine corporate criminal liability in other areas of white collar crime. Hopefully, ameliorative legislation will be enacted that will help to preserve a company's most valuable asset—its trained and highly regarded workforce, and thus make the implementation of effective corporate compliance measures more palatable for the employer.

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