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Targeting Employers: Workplace Enforcement and the Culture of Compliance

Promises and the Culture of Compliance

As we all begin to move away from the new Administration’s honeymoon period, news of ongoing worksite investigations, criminal indictments and heavy-handed convictions of managers and executives is an indication that Immigration related compliance will continue to be a hot topic for the remainder of the President’s term. Speculation of dramatic changes to the way Immigration and Customs Enforcement (ICE) would function under the new Administration in its enforcement efforts of immigration laws are quickly dissipating. The Obama Administration continues to hold employers accountable through administrative audits, as well extensive investigations and prosecutions for the employment of undocumented workers.

“[B]usinesses must be held accountable if they break the law by deliberately hiring and exploiting undocumented workers. We’ve already begun to step up enforcement against the worst workplace offenders We cannot continue just to look the other way as a significant portion of our economy operates outside the law. It breeds abuse and bad practices. It punishes employers who act responsibly and undercuts American workers. And ultimately, if the demand for undocumented workers falls, the incentive for people to come here illegally will decline as well.” President Obama, speech given at the American University’s School of International Service in Washington, DC on Comprehensive Immigration Reform (July 1, 2010)

Campaign promises of immigration reform, including a pathway to legalization and employment authorization, were quickly set aside as pressing matters of the economy and health care took center stage. And now, with a faltering and fragile U.S. and global economy, hopes of reform are set aside while calls for continued and increased enforcement efforts continue. With this backdrop, the Obama Administration made its debut in the realm of immigration and compliance enforcement with clear statements of ICE’s continued objective of targeting bad faith employers with one critical change in the mission: employers will now be the focus of the investigations instead of the undocumented workers. This shift in policy and priorities is also emphasized by ICE’s civil enforcement priorities for the apprehension, detention and removal of certain foreign nationals. On June 30th, ICE’s Assistant Secretary John Morton issued a [memorandum](#) indicating that foreign nationals convicted of crimes as well as those posing a danger to national

security or presenting a risk to public safety are of the *highest priority*. As noted in the Morton memorandum, with the resources to remove approximately 400,000

individuals per year, those who pose a threat and have committed crimes will take priority over undocumented workers whose only crime is living and working in the U.S. without legal status. The businesses that employ them however, do not get a pass.

While the overall ICE plan appears a bit murky, worksite enforcement focusing on employers is clearly a priority as outlined in ICE's strategic plan. In fact, enforcing and administering the United State's immigration laws is now at the very top of ICE's priorities for the next four years. The Agency's [strategic plan](#) specifically notes its goal to "pursue an effective worksite enforcement program to reduce the incentive for aliens to come to, enter, and remain unlawfully" in the United States.¹ Coupled with the realignment of ICE offices into three new directorates, all of the agency's actions reinforce what we are learning with each new headline: ICE is not backing down. The new directorates: Homeland Security Investigations, Enforcement and Removal Operations and Management and Administration are intended to provide a more streamlined operational structure as the agency works to carry out its stated missions.

As discussed in the strategic plan and reiterated in press clips, ICE continues its efforts with the understanding that "the opportunity to work in the United States motivates many to seek illegal entry." So if jobs are the magnet, then enforcement of immigration-related employment laws is critical to securing our borders and ebbing the flow of the undocumented. To achieve the much sought after "culture of compliance," ICE established a two-part plan: engage in "aggressive criminal and civil enforcement against those employers who knowingly violate the law," and continue to promote [E-Verify](#) and IMAGE.



With this in mind, ICE's plan is to continue investigations with a focus on employers by utilizing civil audits. To further promote this culture of compliance, ICE is expected to increase its communication and collaboration with its sister agency, U.S. Citizenship and Immigration Services (USCIS). Several agencies within the executive branch invest significant resources adjudicating applications for admission and benefits, litigating and deciding immigration cases and enforcing final orders of removal. We have seen collaboration and increased efforts by multiple agencies to identify, address and [prevent fraud](#) in immigrant petition.

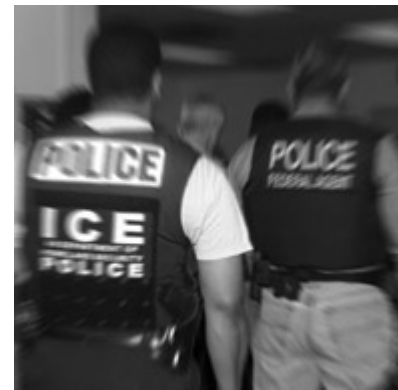
Continued Audits, Prosecutions and Convictions

With an ever-growing list of investigations, charges and convictions posted on [ICE's website](#), enforcement actions are here to stay. Recent convictions and investigations verify the new Administration's stance and goal of promoting a culture of compliance among U.S. employers.

Highlights of these ongoing efforts include the following:

¹ The strategic plan outlining ICE's priorities was released to ICE staff on June 9, 2010.

- June 22, 2010: Sholom Rubashkin, the former Vice President and Chief Executive Officer of Agriprocessors Inc., an Iowa-based kosher meatpacking plant, was sentenced to twenty-seven years in prison (United States v. Rubashkin, N.D. Iowa, No. 2:08-cr-01324-LRR, sentencing 6/22/10). While the specific immigration charges were dropped, the impetus for an expanding investigation of the company was immigration-related. The investigation of the company began in October of 2007 and continued after ICE executed search warrants at Agriprocessors on May 12, 2008 at its Postville, Iowa meat processing plant where nearly 400 workers were arrested. After the ensuing investigation, charges were filed against Rubashkin. The trial evidence showed that Rubashkin was personally involved in harboring hundreds of undocumented workers, and that he paid for and personally inspected their fabricated identity documents.
- June, 2010: Five managers of the Houston-based pallet management services company IFCO Systems North America were indicted for allegedly conspiring to unlawfully employ undocumented workers. The case is being investigated by ICE, the Social Security Administration's Office of the Inspector General, the Internal Revenue Service's (IRS) Criminal Investigations, the U.S. Department of Labor's Wage and Hour Division, and the New York State Police. The indicted IFCO managers include the Vice President of New Market Development, the Senior Vice President of Human Resources, the Senior Vice President of Finance and Accounting, the Controller of Pallet Services and the Human Resources Manager. ICE initiated the investigation back in February of 2005 following a tip about undocumented workers who were allegedly observed ripping up their W-2 forms at the IFCO plant in Albany, New York. On April 19, 2006, ICE agents acting with other federal and state authorities raided over forty IFCO pallet plants in twenty-six states. This massive worksite enforcement action led to the detention of 1,182 undocumented workers. If convicted, each defendant faces a maximum of 10 years imprisonment and a \$250,000 fine. These individual charges are separate and apart from those against the company itself. The company entered into a settlement with the government in December of 2008, where the U.S. District Court for the Northern District of New York agreed to have the company pay \$20.7 million in civil forfeiture and penalties over four years. The settlement amount included back pay and penalties relating to IFCO's overtime violations, as well as civil forfeitures that will be available to support future law enforcement activities.
- June, 2010: Subcontractors in Miami-Dade, Florida were charged with providing jobs to undocumented workers on school construction projects. Luis Daniel, the President of Daniel Builders, Inc., Ariel Daniel, the Treasurer/Director and Marta Duque, the Secretary/Director, were charged with conspiracy to induce aliens to remain in the United States for commercial advantage and private financial gain. They each face a maximum statutory penalty of ten years in prison. The investigation was initiated in February of 2009 after the Miami-Dade County Schools Office of Inspector General discovered that a workforce comprised of undocumented workers, lawful residents and U.S. citizens were being paid substandard wages at a construction project.
- December, 2009: On the eve of an acquisition by meatpacking giant, JBS, Pilgrim's Pride Corporation resolved an ongoing investigation involving the hiring and employment of unauthorized workers in its



Texas plants through a \$4.5 million non-prosecution agreement. Under the terms of the agreement, Pilgrim's Pride agreed to pay \$4.5 million and adopt more stringent immigration compliance practices as well as a monitoring program. The U. S. Attorney's Office agreed to conclude its immigration-related investigation of Pilgrim's Pride and that of any current or former employees.

While the surprise, early morning worksite raids of the Bush Administration are no longer in fashion, with no carrot in sight to incentivize employers to change their practices, the Obama Administration is just as harsh on employers. In fact the focus on employers could be viewed as more intense than before; it is both creative and tactical in its use of the proverbial stick with extensive fines and sentences targeting managers and executives. Under the "new" strategy, it is clear from recent actions that ICE is focusing its resources on auditing, investigating and prosecuting employers to the fullest extent possible.

Obama Administration Audits and Investigations

The Department of Homeland Security (DHS) considers [I-9 Inspections](#) to be one of the most powerful tools the federal government has to enforce employment and immigration laws. In its continued effort to hold employers accountable for their hiring practices, audits, investigations and raids of employers across industries and the country are clearly ongoing. In July of 2009, 652 business were informed of I-9 audits. Following these audits, ICE identified more than 14,000 suspect documents and issued Notices of Intent to Fine totaling \$2,310,255.00.

In November of 2009, ICE announced that 1,000 companies would receive audit notifications and Assistant Secretary Morton noted that "ICE is focused on finding and penalizing employers who believe they can unfairly get ahead by cultivating illegal workplaces We are increasing criminal and civil enforcement of immigration-related employment laws and imposing smart, tough employer sanctions to even the playing field for employers who play by the rules."² These notices have continued throughout 2010. In March, [ICE served 180 notices](#) to businesses in Louisiana, Mississippi, Alabama, Arkansas and Tennessee.

Overall, there has been a significant increase in worksite enforcement since April of 2009 when DHS issued updated guidance focusing on dangerous foreign national criminals and employers who cultivate illegal workplaces by knowingly hiring undocumented workers. Form I-9 audits continue to be the most important administrative tool for the agency in developing criminal cases and bringing employers into compliance. The ICE statistics for May through November of 2009, as contrasted with those of 2008, highlight the agency's implementation of the new strategy:

- 45 businesses and 47 individuals debarred - Zero businesses and 1 individual debarred during same period in FY 2008.
- 142 Notices of Intent to Fine (NIF) totaling \$15,865,181.00 - 32 NIFs issued totaling \$2,355,330.00 in all of FY 2008.
- 45 Final Orders totaling \$798,179.00 - Eight Final Orders issued totaling \$196,523.00 during same period in FY 2008.
- 1,897 cases initiated - 605 cases initiated in FY 2008.
- 1,069 Form I-9 Inspections - 503 Form I-9 Inspections initiated in all of FY 2008.³

² <http://www.ice.gov/pi/nr/0911/091119washingtondc2.htm>.

³*Id.*

Although the Administration intends to pursue employers that ignore best practices, in practical terms, government-initiated I-9 audits have an impact on both the workplace and the undocumented workers. In practice they often lead to mass firings or large scale self-termination of workers who are unable to provide employment verification. It is becoming increasingly critical for companies to take stock of their workforces while investing in the resources necessary to comply with relevant immigration and employment regulations. Companies should also be open to re-tooling and replenishing their workforces where necessary.

Where are we headed?

With only one sentence dedicated to immigration by President Obama in the State of the Union address coupled with the Administration's ongoing political battles, there have been no clear signs of comprehensive immigration reform (CIR) on the horizon. Rather, a glimpse of the Administration's roadmap to date has provided only clear signs of continued and increasing enforcement efforts without any changes to the existing laws and regulations.

Along the way, the President's commitment to immigration reform has ebbed and flowed. On July 1st President Obama changed course again, advocating for CIR during a policy speech given at the American University's School of International Service in Washington, DC. Even though the timing may not be right given the upcoming elections and the state of the economy, President Obama reconfirmed his commitment to CIR. The speech and his call for CIR was in part a response to the ongoing and often heated debate over [Arizona's⁴ existing](#) and proposed legislation designed to tackle illegal immigration. The President asked Congress and the Nation whether "we have the courage and political will" to achieve CIR. Acknowledging the frustration of state governors and legislators, the President noted that the "constant flow of immigrants help make America what it is," and with this in mind, made his case to Congress and the American people for CIR. While the speech was certainly welcoming it was viewed as disappointing for many who were hoping for a detailed plan accompanied by an outline of specific legislation.



Politicians and activists tend to agree that the federal government's inability to act on immigration reform has spurred many states, like Arizona, to take matters into their own hands. While the frustration is felt on both sides of the debate, laws at the state and local level are not the answer. As the President noted, "we all know one clear national standard is needed." If this localized trend continues, we as a nation face a confusing patchwork of local immigration laws that are often ill-conceived and burdensome to both the police and the affected communities at-large. More disturbing than that, many of these laws, like Arizona's [SB 1070](#), have the potential to violate the rights of innocent individuals who are legal permanent residents as well as U.S. citizens. On July 6th, the United States Department of Justice filed a [lawsuit challenging SB 1070](#) confirming that the

Obama Administration is joining the chorus of voices being heard in opposition to Arizona's immigration related laws.⁵

While some speculated that the President would have announced plans to challenge the Arizona statute during his speech on July 1st, that was not the case as his speech was more tempered and sought only to reaffirm his commitment to the issue of CIR. Accordingly, he reiterated that a focus merely on securing the borders is not enough and that "our task is to make national laws that work," while being honest about the problem and demanding accountability from government, businesses and individuals. As he further noted, CIR will require a government that not only secures our borders but also creates a legal system that works for the nation using a practical, common-sense approach. Keeping in line with existing priorities and standards set to create a culture of compliance, the President noted that CIR should require businesses to be held accountable for employing undocumented workers, deliberately hiring and exploiting such workers and otherwise acting irresponsibly. Finally, the President once again expressed support for a form of CIR that would provide for accountability on the part of the undocumented population, noting that to gain legal status in the United States, they would have to admit that they broke the law, pay taxes and fines, learn English and get in line behind those working their way through the existing legal immigration system. The key, as the President noted, is to create a pathway to legalization that is both fair and reflective of American values, and one that functions in concert with continued efforts to secure the border and enforce the nation's existing immigration laws.

While the reality of CIR remains elusive in the political arena, employers must take note that enforcement and worksite investigations remain a tangible reality for businesses nationwide. As such, employers need to continue their efforts in limiting liabilities by conducting in-house reviews and taking action to develop their own "culture of compliance."

Promoting a Culture of Compliance - Best Practices for your Business

- Establish a comprehensive immigration compliance policy
- Conduct in-house audits of Form I-9 documents and company policies, as well as E-Verify if applicable
- Establish policies, protocols and training for employment verification
- Diligently verify the identity of job applicants to ensure that they "are who they say they are"
- Consider use of E-Verify after consultation with experienced immigration compliance counsel
- Establish protocols for addressing Social Security No-Match letters
- Establish and maintain safeguards against the use of the I-9 process for unlawful discrimination
- Create a protocol for immigration compliance related to contractors and subcontractors

ICE utilizes various tools to target employers, particularly those involved with vital infrastructure and national security, as well as the usual suspects - unofficially "targeted" industries - food service, textile, meat/poultry plants and construction. Employers must take steps *now* to ensure full compliance or face serious consequences. Actions taken *before* a government-initiated audit or investigation generally help mitigate damages, reduce exposure and save the company both time and money in the long-run.

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⁵The lawsuit argues that federal law trumps the state statute and requests a preliminary injunction to delay enactment.

[Greenberg Traurig's Business Immigration and Compliance Group](#) has extensive experience in advising multinational corporations on how to minimize exposure and liability regarding a variety of employment-related issues, particularly I-9 employment eligibility verification matters. In addition to assisting in H-1B (Labor Condition Application) audits, GT develops immigration-related compliance strategies and programs and performs internal I-9 compliance inspections. GT has also successfully defended businesses involved in large-scale government worksite enforcement actions, I-9 Audits and Department of Labor Wage and Hour investigations. GT attorneys provide counsel on a variety of compliance-related issues, including penalties for failure to act in accordance with government regulations, IRCA anti-discrimination laws-Office of Special Counsel Investigations, and employers' responsibilities when faced traditional no-match situations as well as more serious workplace identity theft or other alleged misrepresentations made by employees.

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