Immigration Law Compliance
Understanding and Minimizing Liability Risks

Presented by:
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Immigration Law Compliance
Enforcement

Primary government agencies involved:
• U.S. Immigration and Customs Enforcement ("ICE")
• U.S. Citizenship & Immigration Services ("USCIS")
  • Fraud Detection & National Security Unit (FDNS)
  • E-Verify Monitoring Team
• U.S. Justice Department’s Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC")
• U.S. Labor Department Wage & Hour Division (WHD)
• State agencies

Collaboration Among Agencies

• Enhanced inter-agency information and data sharing
• Immigration compliance investigations can lead to audits by:
  – DOL for wage & hour violations
  – DOJ OSC for discriminatory conduct
  – IRS for potential tax fraud (employee misclassification)
Current Enforcement Philosophy

• ICE implemented a three-part strategy
  (1) penalize employers who hire illegal workers;
  (2) deter employers who are tempted to hire illegal workers; and
  (3) encourage all employers to take advantage of compliance tools (like the E-Verify program).

Recent Enforcement Trends

• Increased focus on worksite enforcement
• “Silent Raids” instead of worksite raids
• 500% increase in penalties assessed between FY2009 and FY2013
• Double the number of I-9 audits since FY2009
• More criminal prosecution of companies & individuals
• Average fines exceeded $110,000 per employer
• Debarment proceedings against federal Contractors

Recent Enforcement Trends

• From fiscal years 2009 through 2012:
  – Congress allocated $531 million to ICE for worksite enforcement.
  – ICE conducted almost 10,000 administrative inspections.
  – ICE issued over $30 million in civil fines to employers.
  – ICE debarred over 100 businesses as federal contractors.
Recent Enforcement Trends

• There’s nothing “random” about audits
  – ICE doesn’t select targets by looking at business directory

• Most audits are lead-driven
  – Tip line complaint
  – Local law enforcement data sharing
  – Federal agency data sharing

• Other audits are based on national / regional initiatives

Recent Enforcement Trends

• Some companies get on ICE’s radar because they are critical infrastructure or key resource industries:
  - Agriculture and Food
  - Banking and Finance
  - Chemical
  - Commercial Facilities
  - Communications
  - Critical Manufacturing
  - Defense Industrial Base
  - Emergency Services
  - Energy
  - Government Facilities
  - Healthcare and Public Health
  - Information Technology
  - National Monuments and Icons
  - Nuclear Reactors, Materials and Waste
  - Postal and Shipping
  - Transportation Systems
  - Water and Dams

Penalties for Non-Compliance

• Civil Penalties
  – Cease and Desist Order
  – Fines and back wages for subjecting employees to discrimination / adverse action during I-9 verification
  – Fines for:
    • Knowing Employment of Illegal Aliens
    • Paperwork Violations
  – Debarment from entering into federal contracts
Penalties for Non-Compliance

- Criminal Penalties
  - Pattern and practice in hiring
  - Knowingly hiring 10 unauthorized workers within 12 months
  - Transporting, harboring, or inducing
    - Forfeiture of assets
    - Making false statements on I-9 form
    - Visas Fraud

Sample Enforcement Outcomes

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<thead>
<tr>
<th>Sample Penalties for Immigration Law Violations</th>
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<tbody>
<tr>
<td>October 2013</td>
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<td>June 2013</td>
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<td>December 2012</td>
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<td>September 2010</td>
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<td>September 2009</td>
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ICE Audit Process

- **Step 1:** Employer Receives Subpoena/Notice of Inspection (NOI)
  - 3 days to produce originals I-9s plus other items:
    - Payroll records
    - Business licenses, FEIN, articles of incorporation
    - 941 quarterly taxes
    - SSA No Match letters/correspondence

- **Step 2:** ICE Forensics Analysts review I-9 forms (a few weeks to several months)
ICE Audit Process

- **Step 3:** If violations, ICE issues:
  - Notice of Discrepancies/Technical Violations
  - Notice of Suspect Documents

- **Step 4:** Employer shows compliance with findings
  - Certain technical violations - made corrections within 10 days
  - Notice of Suspect Documents – employee contests (with new documentation/info) or employer terminates

- **Step 5:** ICE issues either:
  - Warning Notice, or
  - Notice of Intent to Fine (NIF)

- **Step 6:** If NIF issued, employer either:
  - Reaches settlement with ICE, or
  - Proceeds to Administrative Law Judge hearing

OSC Enforcement

- Immigration Act prohibits discrimination based on citizenship status or national origin
- Enforced by Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)
- OSC is pursuing more "pattern or practice violation" cases
- Can become expensive and document intensive litigation
OSC Enforcement

- Investigates discrimination claims brought by applicants, current employees, former employees (“charging party”)
- OSC can:
  - Award reinstatement of employment
  - Award back pay
  - Award civil penalties
  - Expand investigation to “pattern and practice”

Prohibited conduct:

- Requesting that employees produce more documents than required by the I-9 rules;
- Requesting that employees present a particular document;
- Rejecting documents that reasonably appear to be genuine and belong to the employee; and
- Treating groups of applicants differently when completing the I-9 form,
  - Example: requiring certain employees who appear “foreign” to produce particular documents that the employer does not require other employees to produce.

OSC Enforcement Process

- U.S. citizens and all work authorized individuals are protected from document abuse
- Protection from threats, intimidation and retaliation
- Injured party files charges with OSC within 180 days of alleged act
- OSC may investigate for up to 210 days
- Fines/penalties per affected I-9/employee
  - Example: College system paid $257,000 in fines to settle document abuse case
Penalties for Discrimination / Document Abuse

- Civil fines ($325 to $3,200 per count)
- Cease and desist
- Back pay and rehire
- Supervised compliance
- Retain records of people applying for three years
- Debarment from participating in federal contracts

Common Discrimination Mishaps

- Over-documentation: asking for or recording more documents than required
- Re-verification of documents when not required
- Mandating that employee present a specific document, either initially or at re-verification
- Handling I-9 process inconsistently
- Refusal to accept a document, or hire an individual, because a document has a future expiration date
- Limiting of jobs to U.S. citizens

Visa Benefits Fraud

- Visa Fraud (18 USC §1546)
  - Punishable by up to 10 years in prison (per count)
- Misrepresentation (INA §212(a)(6)(C))
  - Permanent bar to the United States (with only limited waiver opportunities) for employee
USCIS: FDNS Worksite Visits

- Worksite Inspections
  - Fraud Detection & National Security Unit (FDNS) worksite visits, funded by certain employer-sponsored work visa fees
  - Inspector’s goals:
    - Verify employer is legitimate; and
    - Verify foreign worker is properly employed under terms/conditions of visa sponsorship application (job title, duties, worksite location)
- Sanctions include revocation of visa petition, denial of pending petitions, criminal charges

USCIS – FDNS Site Visits

- Usually unannounced and without pre-warning
- Inspector will ask to:
  - Speak with the employer representative
  - Speak with the sponsored worker
  - Inspect documents related to the petition
  - Take photos of the worksite

USCIS – FDNS Site Visits

- Potential violations
  - Job location not listed on the sponsorship petition
  - Sponsored worker not receiving the required wage
  - Fraudulent documents or worker credentials
  - Non-existent business or office location
  - Job duties materially different than listed on sponsorship petition
  - Sponsored worker paid the $1,500 American Competitiveness and Workforce Improvement Act (ACWIA) fee

![Attention Icon]
USCIS – FDNS Site Visits

• How to prepare:
  – Be familiar with content of visa petition
  – Inform sponsored worker of inspection possibility
  – Sponsored worker needs to know content of visa petition
  – Sponsored worker must be paid wages / salary stated in visa petition
  – Sponsored worker should not pay visa fees
  – Have mandatory compliance files ready

Risk Coming From Private Litigants

• Civil Racketeer-Influenced and Corrupt Organizations ("RICO") actions
  – Brought by current / former employees
  – Brought by competitors
  – Allege defendant gained financial advantage through knowing violations of immigration laws
  – Usually expensive class-action litigation
  – Plaintiffs get treble damages & attorney's fees

A Successful Compliance Plan

• Consider the E-Verify program
  – Voluntary (unless state or executive order for federal contracts law applies)

• What does E-Verify accomplish?
  – Rebuttable presumption of legal workforce.
  – No “safe harbor” from worksite enforcement
  – Possible increase risk of audits if not done correctly
A Successful Compliance Plan

• Best Employment Practices:
  – Implement written compliance program
  – Understand and follow various state laws on immigration
  – E-Verify for all hiring
  – Annual training for hiring personnel
  – Only trained employees complete I-9s
  – Annual internal I-9 audits
  – Protocol for responding to no-match letters from SSA
  – Safeguards against use of the verification process for unlawful discrimination
  – Compliance Officer

A Successful Compliance Plan

• Best Employment Practices:
  – Implement SOP for dealing with law enforcement showing up on premises
  – Review / monitor contractor and subcontractor compliance
  – Be mindful of compliance obligations arising out of work visa sponsorship

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