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DEBARMENT FROM FEDERAL CONTRACTS: A NEW WEAPON IN ICE'S INTENSIFIED CAMPAIGN OF WORKSITE IMMIGRATION ENFORCEMENT?

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On February 13, 1996, President Clinton issued Executive Order 12989 ([available online](#)) which provides for the possible debarment from federal contracts for contractors that knowingly employ foreign nationals unauthorized to work in the United States (“undocumented workers”), or continue to employ such workers after learning of their immigration status.¹

Debarment seems to have been rarely, if ever imposed by the Clinton administration, and for most of George W. Bush's two administrations. Repeated web searches by this author failed to find a single report of a government contractor being debarred as a result of employing unauthorized workers prior to September 2008.

However, it appears the Federal Government has now decided to add the debarment-arrow to its worksite enforcement quiver. On September 12, 2008, U.S. Immigration and Customs Enforcement

¹ President Clinton's Executive Order has subsequently been amended by two Executive Orders issued by President George W. Bush. Executive Order 13286, issued on February 28, 2003 ([available online](#)) transferred enforcement authority from the Attorney General to the Security of Homeland Security, consistent with the creation of DHS and the accompanying over-hall of the country's immigration enforcement and regulatory system. The majority of Executive Order 13465, issued on June 6, 2008 ([available online](#)) addresses the imposition of an Electronic Employment Eligibility Verification System favored by the present administration. However, it also changes some of the language of the prior to two Executive Orders with regard to debarment, and in hindsight may have signaled a determination by the Bush Administration to begin using debarment as a tool in its stepped up effort to enforce this nation's workplace immigration laws.

The main regulation implementing the above Executive Orders is Subpart 9.4 of the Federal Acquisition Regulation, issued by the General Services Administration, Department of Defense and National Aeronautics and Space

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(“ICE”) announced that it had notified seven companies that they would “be considered for debarment from federal contracting because each ha[d] been found to be unlawfully employing persons without employment authorization.” ICE’s *News Release* ([available online](#)) immediately began to be widely reported and reproduced by other sources on the internet. The seven companies come from six different states, and encompass a wide range of industries, including: construction, cleaning, landscaping, and even the canning of fruits and vegetables.

On the same day that it issued the above *News Release*, ICE released a *Fact Sheet on Debarment* ([available online](#)) which noted that “ICE currently has not debarred any contractors”, and noted that its new campaign is a break from past policies. A portion of the *Fact Sheet* is set forth below:

7.) I didn’t know about this policy before. Why is my company being debarred now?

The former [Immigration and Naturalization Service (“INS”)] was authorized to debar companies who hire unauthorized workers in 1996. The INS worksite strategy, however, focused primarily on the use of civil fines to gain employer compliance. In contrast, ICE implemented a worksite enforcement strategy that focused on bringing criminal charges and seeking criminal fines and forfeitures against employers. This investigative strategy has resulted in convictions and violations that make companies amenable for debarment. The initial companies notified of possible debarment have been found to have knowingly hired or continued to employ unauthorized workers within the past 2 years.

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Because many businesses rely upon federal contracts to survive, debarment poses a potentially fatal sanction for the employment of unauthorized workers. Despite the gravity of such action, the current procedures provide limited opportunity for a contractor to challenge government action when faced with possible debarment. In general, a determination by the Secretary of Homeland Security that a “hiring violation” has occurred is not reviewable. However, the decision by the relevant contracting agency whether or not to debar the offender is discretionary. In exercising this discretion:

The debarring official must determine whether debarment is in the Government’s interest. ... The existence of a cause for debarment does not necessarily require that the contractor be debarred. The seriousness of the contractor’s acts or omission and any remedial measures or mitigating factors should be considered before any debarment action is taken (ICE September 12, 2008 *Fact Sheet*).

Debarment for the employment of undocumented workers can be for up to one year, but may be extended for additional one year increments if continuing violations are found to exist.

Section 4(c) of President Clinton’s original Executive Order provides that “the scope of debarment generally should be limited to those organization units ... [that] are not in compliance with the INA employment provisions.” However, AUSTIN T. FRAGOMEN, JR., *ET AL*, in IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK § 6.22 p. 367 (Thompson West, ed. 2007-2008 edition.) warns:

The government has interpreted similar language in the employer sanctions statute [of Immigration Reform and Control Act] very narrowly []. A similar interpretation of the “organizational units” language contained in the Executive Order will mean

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that very few companies will qualify to have their subdivisions considered separate entities for penalty purposes.

Fragomen's concern that the government reserves the right to narrowly interpret Section 4 (c) of President Clinton's Executive Order appears warranted. In its, September 12, 2008 *Fact Sheet* ICE noted that debarment for the entire company, as opposed to discrete subdivisions, is the **default position** in such enforcement actions: "Debarment constitutes debarment of all divisions or other organizational elements of the contractor *unless* the decision is limited by its terms to specific divisions, organizational elements, or commodities." (Emphasis added).

Should a company find itself the target of a worksite enforcement action, Fragomen wisely recommends that it "attempt to negotiate a no debarment clause in any settlement agreement" entered into with the government. Suprn., at p. 368

ICE's apparent decision to add debarment to its aggressive worksite enforcement strategy, includes bringing criminal charges and seeking criminal fines and forfeitures against employers and their agents. This is one more reason that employers and their agents need to be aware of their legal responsibilities regarding the employment of undocumented workers, and the need for companies to put into place the systems and procedures necessary to ensure compliance.