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AN EMPLOYER'S INTRODUCTION TO IMMIGRATION LAW AND WORKSITE ENFORCEMENT

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I. Introduction: The New Paradigm of Worksite Enforcement:

On December 12, 2006, hundreds of agents from United States Immigration and Customs Enforcement (“ICE”), which is charged with the interior enforcement of the nation’s immigration laws, raided six meat processing plants owned by Swift and Company in six states throughout the Midwest. The action, which was dubbed, Operation Wagon Train, was the largest worksite enforcement action in the United States up to that time. Agents arrested 1,297 individuals believed to be foreign nationals working illegally in the United States (“undocumented workers”), of which 274 were charged with additional criminal offenses such as ***Identity Theft*** and ***Fraud and Misuse of Immigration Documents***. On July 10, 2007, ICE arrested twenty more current or former employees of Swift, including a union official who later plead guilty to felony ***Harboring Illegal Aliens***, a Human Resource employee, and supervisors.

Operation Wagon Train ushered in a new era of worksite enforcement of this nation’s immigration laws. Raids netting hundreds of suspected undocumented workers, and the prosecution of individuals on ***Harboring*** and other felony charges related to the employment of such workers, have become common occurrences. At the same time, ICE has increasingly targeted small businesses that employ undocumented workers, including bringing felony charges against their owners and agents. Finally, ICE has made the decision to go after the assets of the companies that employ undocumented workers through the use of criminal fines and forfeiture actions.

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All employers must become aware of this new paradigm of workplace enforcement, and take all reasonable steps to ensure that they are in compliance with the country's immigration laws. This article reviews the changes that have occurred in the enforcement of the country's workplace immigration laws since the passage of the *Immigration Reform and Control Act* (IRCA)¹ on November 6, 1986, the responsibilities of employers under IRCA, and potential criminal charges those employers who knowingly employ undocumented workers, or do so with reckless disregard to their undocumented status

II. Enforcement From the Passage of IRCA to Today:

Prior to the passage of IRCA on November 6, 1986, no federal law required employers to verify that their employees were permitted to work in the United States, or specifically prohibited the employment of undocumented workers. IRCA imposed the responsibility on employers to take, what the law considers reasonable steps to verify the identity of all new employees and their work status through a procedure referred to in the statute as the Employment Verification System (also referred to herein as the "Form I-9 compliance system"), the symbol of which has become the three page Form I-9 now required for all new employees hired after November 6 1986, the Form I-9. In addition, IRCA imposed new criminal and civil penalties for those who knowingly employ undocumented workers.²

¹ *See Immigration and Nationality Act* (INA) §§ 274A, 274B and 274C; 8 U.S.C. §§ 1324A, 1324B and 1324c.

² In addition, as discussed in Section III, the law continues to impose potentially severe criminal sanctions for bringing in, or harboring, undocumented immigrants. These laws on their face seem to target human smugglers, but have increasingly been used in the employment context against companies and their agents.

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After the passage of IRCA, the Immigration and Naturalization Service (“legacy INS”), which was then agency then charged with the interior enforcement of the nation’s immigration laws, initiated a series of high profile raids on workplaces throughout the country. The primary targets of the raids were the undocumented workers themselves. The companies which had hired the workers were generally subject to civil fines but criminal penalties, either against companies or their individual agents, were extremely rare. After this initial burst of enforcement activity, the number and scale of the raids quickly decreased. Moreover, Legacy INS found that when fines were imposed, the amounts were often so low that employers simply calculated them as a cost of doing business.

In March 2003, responsibility for the interior enforcement of the nation’s immigration laws, including workplace enforcement, was transferred to ICE, part of the new Department of Homeland Security, which was created in response to the attacks on September 11, 2001.

With more than 15,000 employees and a budget of almost five billion dollars, ICE is the largest investigative agency within the DHS, and the second largest investigative agency within the United States government. Only the Federal Bureau of Investigation (FBI) is larger. In conducting its worksite investigations and enforcement actions, ICE cooperates with numerous other federal and state law enforcement agencies, further leveraging its already considerable investigative resources. Moreover, ICE has effectively utilized investigative tools and strategies that are normally associated with investigations into drug trafficking and other organized crime, such as making use of cooperating informants, one party intercepts, and even undercover agents posing as undocumented workers. Finally, in contrast to Legacy INS, ICE has emphasized bringing criminal charges and forfeiture actions (which generally impose a much greater monetary penalty than civil fines) against companies and their agents who employ undocumented workers.

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As noted by Josie Gonzalez and Nancy-Jo Merritt, in *The Anatomy of an Ice Raid*, in AILA'S GUIDE TO WORKSITE ENFORCEMENT AND COPORATE COMPLIANCE (The American Immigration Lawyers Association, 2008):

It is important to understand that ICE is nothing like the investigations division of legacy [INS]. ICE is a powerful, well-funded, effective enforcement agency. Its Investigations are well managed, in partnership with such disparate agencies as the U.S. Attorney's office, state police departments and security agencies, the Social Security Administration (SSA), the Internal Revenue Service (IRS), the Department of Labor (DOL), [DHS's] Office of Inspector General (OIG), and the [FBI] as necessary. It is important to note that the [INA] which authorizes delegation to state and local law enforcement officials of the power to investigate, apprehend, and detain aliens has become a very popular tool. Many local law enforcement agencies now have "embedded" local immigration agents, extending the breadth and reach of enforcement activities. *Id.*, at 179-80.

The number of work site investigations conducted by ICE, and resulting criminal actions against companies and individuals have risen exponentially in the last few years. For example, in 2004, ICE arrested less than 175 individuals. In a News Release dated September 3, 2008, ICE noted that:

So far this fiscal year (Sept. 30, 2007 through Aug. 15, 2008) ICE has made 1035 criminal arrests tied to worksite enforcement investigations. Of those, 121 are [agents of the employers] accused of violations ranging from alien harboring to knowingly hiring illegal aliens. The remaining criminal defendants are workers arrested on charges including aggravated identify theft and Social Security fraud. ICE has also made approximately 4,500 administrative arrests during worksite enforcement operations this fiscal year.

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Understandably, it has been the larger enforcement actions by ICE that have captured the headlines, such as the May 12, 2008 raid on the Agriprocessors Inc. meat processing plant in Postville, Iowa, in which 389 workers were arrested on suspicion that they were undocumented, and which resulted in numerous felony charges being brought against managers and other agents of the employer³. On August 25, 2008 an even larger raid targeted Howard Industries Inc., an electric transformer manufacturing facility in Laurel Mississippi, in which approximately 595 workers were arrested.

However, as a visit to ICE's [Worksite Enforcement News Releases](#) reveals, ICE frequently targets small businesses and their owners and agents. The weekly, sometimes daily postings detail the increasing number of employers across the country being charged with employing undocumented workers and other criminal activity, such as Harboring and Money Laundering. For example, on April 16, 2008, ICE arrested eleven individuals, who were employed in restaurants located in four states, and charged them with conspiring to harbor undocumented workers from Mexico. Those arrested included not only the owner of the seven restaurants involved, but the managers of the individual restaurants. On April 25, 2008, ICE arrested a Mexican national illegally present in the United States and his American citizen wife and charged both with *aiding and abetting each other* in the

³ Since the raid in Pottsville, two supervisors have entered guilty pleas to charges that included ***Conspiring to Hire Illegal Aliens***, and ***Aiding and Abetting the Harboring of Illegal Aliens***. Both must cooperate with authorities in their ongoing investigations as part of their pleas. One of the supervisors faces a maximum penalty of up to ten years in prison and a \$500,000 fine, while the second faces a maximum of five years imprisonment, and a \$250,000 fine. For more discussion regarding potential criminal charges and penalties for employing and harboring undocumented workers see Section III herein, **Potential Criminal Sanctions for the Employment of Undocumented Workers**.

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harboring and transportation of undocumented workers in relation to the Mexican national's roofing company.

In addition to criminal investigations, IRCA gives ICE the authority to conduct random I-9 audits of employers. ICE merely has to give an employer three days advance notice. If the audit reveals deficiencies in the employer's Form I-9 compliance system, such as mistakes on the Forms themselves or failures to maintain the Forms for the proper length of time, the law often requires that fines to be leveled for each violation. The presence or absence of undocumented workers on an employer's payroll is immaterial.

As a result of this new enforcement paradigm, even small companies who formerly may have considered employing undocumented workers can no longer rely upon their relative anonymity in the hope of escaping the attention of ICE and other relevant law enforcement agencies. Moreover, such companies, even if they employ only American nationals, cannot neglect their responsibilities under the I-9 Verification System. As observed by AUSTIN T. FRAGOMEN, JR., *ET AL*, in IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK § 5.1 p. 250 (Thompson West, ed. 2007-2008 edition):

The scope of government compliance efforts and the standards described in this chapter for selecting employers for worksite investigations makes it possible that any employer of any size could end up being visited by ICE or [Department Of Labor] inspectors. Given the government's aggressive enforcement policy adopted in recent years, it is likely that investigators will seek criminal sanctions and/or civil fines against employers in the first instance when violations are uncovered

III. Employer Due Diligence in the Age of Increased Workplace Enforcement:

For the reasons set forth above, it is more incumbent than ever for employers and their agents to take all reasonable measures to ensure that their workers are properly documented. It is also incumbent on ALL employers, whether or not foreign nationals make up part of their workforce, to ensure that they have taken reasonable steps to comply with the I-9 Employment Verification System, and that this is documented.

The first steps for employers to ensure compliancy are: (i) review current company Form I-9 compliance policies and update them where necessary; and, (ii) ensure that the personnel charged with administering these policies are adequately trained. Because the law on this matter changes with some regularity, this should include periodic refresher courses. It is also wise, especially for larger employers, to have regular Form I-9 audits conducted by an outside entity to learn of any deficiencies that may exist, to document them and to the extent possible correct them, and to ensure that they do not occur in the future. Should the employer find itself the subject of an ICE audit, such proactive steps will demonstrate that it has made a good effort to comply with the law. This is important because the law *mandates* fines for many types of I-9 violations, even if they are unintentional.⁴ However, the amount varies from “no less than \$100 [to] not more than \$1,000 for

⁴ For example, fines can be imposed if individual I-9 Forms were: (i) not filled out in a timely manner; (ii) filled out incorrectly; (iii) the wrong type of identification was accepted for verification purposes; or, (iv) the Forms were not kept for the mandated length of time. Whether not a given Form I-9 pertained to an unauthorized worker, or even a foreign national is immaterial.

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each individual with respect to whom such violation occurs” (INA§274A(e)(5)). Among the factors to be considered by ICE in determining the amount of the fine is “the good faith of the employer”.⁵

With the increase in worksite enforcement of the country’s immigration laws, human resource managers and other personnel may be tempted to avoid the issue by either by treating certain classes of workers differently, or refusing to hire such workers altogether. Not only is such conduct morally wrong, but it can lead to the employer being fined by the government, or sued by workers. IRCA includes provisions that make it illegal for employers to discriminate on the basis of national origin or citizenship. An employer cannot impose certain requirements for some workers, and not on others. Although the employer may honestly believe it is only being vigilant, such conduct amounts to illegal discrimination. Thus ALL policies and procedures must be equally applied to all employees.

⁵ In the course of conducting many I-9 audits, including for some of the largest companies in the United States, GoffWilson has found that the average compliance rate was only 5%. Thus, 95% of the Form I-9s examined were deficient either in the way they were filled out, in the employer’s methods for verifying the applicable workers’ identities and work status, or in some other manner. GoffWilson has never found a compliance rate better than 15%. Without a doubt the companies retained by GoffWilson have wanted to comply with the Form I-9 requirements. However, given that IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK, *supra*, one of the standard legal reference manuals for employment immigration law and Form I-9 compliance, is *over 950 pages long*, it is understandable that good faith mistakes are the rule, and not the exception. The response by employers to such mistakes should not be to unfairly blame and punish human resource managers and other personnel who have been charged with administering the Form I-9 compliance process usually without the proper training or guidance, but to give them the training and tools they need to do their job.

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IV. Potential Criminal Sanctions for the Employment of Undocumented Workers:

After an ICE investigation or raid, should it be found that an employer or its agents knowingly employed unauthorized workers, or with reckless disregard to their status, the company and its agents can reasonably expect to face not only civil penalties, but criminal charges. A discussion of these likely criminal charges follows.

On its face, the primary criminal statute aimed at deterring and punishing the knowing employment of undocumented workers is Immigration and Nationality Act (INA) § 274A, ***Unlawful Employment of Aliens*** [8 U.S.C. 1324-a], which makes it illegal for any “person or other entity” to knowingly:

- Employ an undocumented worker;
- Recruit an undocumented worker for a fee; and to,
- Continue to employ a worker after learning that s/he is undocumented

A person or entity that “engages in a pattern or practice” of employing undocumented workers “shall be fined not more than \$3,000 for each unauthorized alien with respect to whom such violation occurs, imprisoned for not more than six months for the entire pattern or practice or both.”

The above penalties are minor compared to those which may be imposed for violations of INA § 274 ***Bringing in and Harboring Certain Aliens*** [8 U.S.C. 1324]. Section 274 provides maximum penalties that range from five years imprisonment (in some cases, for *each* undocumented worker involved), to ten years imprisonment for certain conduct, including if the act was “done for the

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purpose of commercial advantage or private financial gain.”⁶ In addition, Section 274 allows for the imposition of fines; the seizure of any vehicle used to transport undocumented workers; and the seizure of “the gross proceeds of such violation, and any property traceable to such conveyance or proceeds.”

The added penalties of Section 274 apply when an individual knowingly employs ten or more undocumented workers in a given 12 month period. In addition, as its name suggests, INA § 274 ***Bringing in and Harboring Certain Aliens*** outlaws a wide range of conduct beyond strictly employing undocumented workers. This conduct, which only has to be in “reckless disregard of” the worker’s undocumented status, includes:

- Transporting or moving undocumented workers within the United States;
- Concealing, harboring, or shielding undocumented workers from detection;
- Encouraging or inducing undocumented workers to enter or reside in the United States; or
- Attempting to commit, conspiring, or aiding or abetting in the commission of any of the above

Because of the breadth of conduct outlawed by Section 274, it can be used against individuals who may have assisted their companies in employing undocumented workers, but who may otherwise not be liable for actually employing the workers themselves. Recently, federal prosecutors have successfully charged individuals with violating Section 274, where the defendants:

⁶ Section 274 allows for truly draconian penalties of up to 20 years imprisonment if the conduct causes serious bodily injury to another, or life imprisonment and even death, if the conduct results in the death of another. Such penalties appear to be reserved for human traffickers as opposed to employers or their agents.

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- Provided undocumented workers with housing;
- Changed this housing to help the workers avoid detection;
- Counseled or advised undocumented workers on how to avoid detection by Immigration and local law enforcement;
- Counseled undocumented workers on the best way to fill out their W-2 Forms to minimize withholdings and maximize their net incomes;
- Obtained, or helped the undocumented workers obtain, false identification;
- Intervened on behalf of their unauthorized workers with local law enforcement by claiming that they were documented;
- Assisted unauthorized workers who were having difficulty cashing pay checks because of a lack of valid identification, by vouching for them at the bank

Other criminal charges not normally associated with the employment of undocumented workers that have been successfully brought against employers and their agents for such conduct include: ***Misuse of Social Security Card***, 42 USC § 408; ***Identity Theft***, 18 USC § 1028A, ***Laundering of Monetary Instruments*** (money laundering) 18 USC § 1956, and even ***Racketeer Influenced and Corrupt Organizations*** (RICO) 18 USC Chapter 96 for pattern violations, which is normally associated with organized crime. Each one of ____ offenses can carry substantial criminal penalties. For example, money laundering, which may occur when an employer attempts to disguise profits derived from undocumented workers, is punishable by up to 20 years imprisonment.

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V. Conclusion:

Given the tremendous increase in the amount of resources now being devoted to the worksite enforcement of the nation's immigration laws, it is now more important than ever for employers and their agents to be aware of their legal responsibilities under IRCA and other relevant laws, and to put into place the systems and procedures necessary to ensure their compliance. Without a doubt, most employers want to take reasonable steps to avoid employing undocumented workers, and at the same time not discriminate against their employees on the basis of race, ethnicity, country of origin, or citizenship. Unfortunately, given the complexities of IRCA and the relevant administration regulations, good faith is often not enough. Employers, especially larger ones, are well advised to seek outside expertise to ensure that their systems and procedures are adequate to the task, and that their agents have the training and tools they need to carry them out.

Employers and their agents who ignore the risks and knowingly, or with reckless disregard to their status, employ undocumented workers are increasingly likely to be subject of an ICE investigation and enforcement action. In addition to causing a major disruption to the activities of the employer, such actions are likely to result in criminal charges being filed against the employer and its agents. The resulting penalties can be severe, resulting in large fines, forfeiture actions and substantial prison sentences.