

## A Framework for Effective Immigration Worksite Employer Enforcement

Immigration enforcement is an extremely important national priority. Effective control of our nation's borders is essential to our national security. The regulation and control of those who enter the country, along with the prosecution of those who violate immigration laws once they are here, is fundamental to our integrity as a nation of laws.

Today, our government is faced with the dilemma of enforcing a set of laws that no longer match the needs and demands of a 21<sup>st</sup> century society and economy. The job of reforming our immigration laws rests with the U.S. Congress, which to date has been unable to agree on a comprehensive plan for reform. The result is that an estimated 5.1% of our nation's workforce is undocumented. And undocumented workers comprise an even higher percentage of the workforce in particular sectors of the economy such as agriculture, hospitality, and food production.

In an environment where there are worker shortages in certain sectors of the economy, and where our immigration laws provide no legal visa program under which employers can hire immigrant workers, employers are caught between a rock and a hard place. Employers seeking to hire a legal workforce often find it difficult to discern that a worker may have presented a fraudulent document as proof of their authorization to work. These contradictions will only be resolved when a reformed immigration system provides paths for legal entry and work authorization to immigrant workers whose skills and presence are needed to restart and grow the U.S. economy.

Nonetheless, even in the current environment of broken immigration laws, immigration enforcement, like all law enforcement, must be done professionally and must be directed by a clear set of reasonable priorities. Nowhere is this more important than in the arena of worksite enforcement. Our nation's employers and workers must know what is required of them under the law, and must be given clear guidelines and tools with which to comply with the law. Anything less compromises the ability of our nation's businesses to remain productive and competitive in the global economy and undermines workers' ability to contribute their own skills and talents to economic growth.

The following principles, discussed in more detail below, can be used to evaluate the effectiveness of an immigration worksite enforcement program:

- Accountability to stated priorities
- Accessibility of information
- Uniformity and consistency of standards
- Proportionality of sanctions

### Background

Enforcement of immigration laws at the workplace began in earnest with enactment of the Immigration and Control Act of 1986 (IRCA), which for the first time required employers to verify the eligibility of their employees to engage in lawful employment in the United States. A system of civil and criminal penalties known as "employer sanctions" was imposed, and a new form, the I-9, was introduced as a means of documenting that the employer had conducted the required verification.

The agency now responsible for worksite enforcement is U.S. Immigration and Customs Enforcement (ICE). The purpose of worksite enforcement is summarized in a recent ICE memorandum: "...to reduce the pull of illegal employment, ease pressure at the border, and protect employment opportunities for the nation's lawful workforce."

Under the new Worksite Enforcement strategy announced in April 2009, the Administration will focus

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worksite enforcement resources on the criminal prosecution of employers, not on the prosecution and deportation of large numbers of unauthorized workers. Worksite enforcement investigations are to prioritize critical infrastructure and cases in which there are “egregious violations of criminal statutes by employers and widespread abuses.” ICE looks for evidence of “mistreatment of workers, along with evidence of trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering, and other such criminal conduct.

Within this overall goal, ICE currently prioritizes the following: 1) criminal prosecution of employers; 2) imposition of civil fines and penalties (including debarment from work on federal contracts) where criminal prosecution is not feasible; 3) removal of unlawful workers from critical infrastructure and national security worksites.

The main tool that the Administration is using to enforce employer compliance with immigration laws is the I-9 audit. Following sometimes lengthy investigations, and based often on anonymous tips, ICE issues a “Notice of Inspection” (NOI) and then conducts an administrative audit of employers’ I-9 files. ICE may issue “Discrepancy” and “Suspect Document” letters, and may allow an employer to correct technical deficiencies in its records. Where the evidence does not support a criminal prosecution, ICE may issue a “Notice of Intent to Fine” (NIF) and impose civil monetary penalties on the employer. ICE may also initiate debarment proceedings and debar a company from securing work on federal contracts. Criminal prosecutions of company owners, managers, and human resources personnel are also used as part of ICE’s worksite enforcement strategy. These prosecutions are conducted in partnership with U.S. Attorneys’ Offices.

ICE has set up a program called “IMAGE” (ICE Mutual Agreement between Government and Employers) to provide employers with training and tools to ensure compliance with the law. Since the program’s inception in 2006, only 115 employers have reportedly registered with the program. While the program is intended to build better relationships between ICE and private-sector employers, the program offers no safe haven from ICE enforcement actions or fines, and requires companies to submit to a complete audit of their I-9 files. ICE also recently announced that it would be setting up a new audit office as it further intensifies its I-9 audit program.

The E-Verify program, an electronic program designed to verify an employee’s eligibility to lawfully work in the U.S., is another tool that employers are urged by ICE to use to minimize the employer’s risk of unknowingly hiring undocumented workers. The E-Verify program is presently voluntary, and approximately 238,000 employers currently use it.

The E-Verify program itself is a compliance program, not an enforcement program. E-Verify does not offer protection or safe harbor and does not protect employers from worksite enforcement actions. A December 2010 report from the Government Accountability Office (GAO) notes improvements in the program, but states that significant problems remain unaddressed. For example, the report cites a recent study which estimated that over half of employees who are in fact not authorized to work in the U.S. were incorrectly confirmed by E-Verify. Necessary changes and improvements to the program have been advocated by a wide range of stakeholders. Such changes, if accompanied by a program to legalize the currently undocumented portion of the U.S. workforce, could make E-Verify an extremely useful tool to help employers achieve compliance with immigration laws.

## Recent Worksite Enforcement Statistics

ICE’s recently re-invigorated focus on employers has resulted in significant increases in debarments and civil fines and sanctions against employers.

Following the April 30<sup>th</sup> announcement of its new worksite enforcement priorities, ICE reported an increase in worksite enforcement performance measures during a six-month period of FY 2009 compared to the same period in FY 2008:

<b>FY 2009</b>  <b>(Six-month period)</b>	<b>FY 2008</b>  <b>(Six-month period)</b>
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45 businesses and 47 individuals debarred	0 businesses and 1 individual debarred
142 Notices of Intent to Fine totaling \$15,865,181	32 Notices of Intent to Fine totaling \$2,355,300
45 Final Orders totaling \$798,179	8 Final Orders totaling \$196,523
1,897 cases initiated	605 cases initiated
1,069 Form I-9 Inspections	503 Form I-9 Inspections

Source: U.S. Immigration and Customs Enforcement, "News Release: ICE Assistant Secretary John Morton announces 1,000 new workplace audits to hold employers accountable for their hiring practices," November 19, 2009.

In early October 2010, Department of Homeland Security (DHS) Secretary Janet Napolitano reported that, since January 2009, ICE has audited more than 3,200 employers suspected of hiring illegal labor, debarred 225 companies and individuals, and imposed approximately \$50 million in financial sanctions—more than during the entire previous administration. ICE reports that in FY 2010, 196 employers were arrested for criminal violations related to worksite enforcement.

These enforcement actions raise several questions:

- Are larger numbers of audits and fines an indicator of success?
- Is ICE following its own stated priorities and targeting employers with egregious violations of criminal statutes and widespread abuse?
- Does ICE apply a consistent set of standards in determining whether paperwork violations are merely technical or whether they rise to the level of serious substantive violations?
- Are the fines and penalties imposed consistent across the U.S. and are they proportional to the violations committed?
- Does ICE adequately prepare employers with the information they need to comply with the law?
- What is the impact of worksite enforcement on employers, workers, and the local economy?

## Impact on Employers and Workers

The impact of worksite enforcement actions on companies, the workers they employ, and the communities they serve can be severe. For example:

- **Loss of productivity:** American Apparel, a Los Angeles-based company that asserts it is "sweatshop free" and uses a single manufacturing facility, was charged by ICE in July 2009 with employing 1,600 undocumented immigrants. No allegations of wage, hour, or working-condition violations were made. The company is reportedly the largest clothing manufacturer in the U.S., employing some 4,000 workers at average pay of \$13 per hour. The company dismissed the 1,600 workers after it was unable to document their status or correct problems with their employment records. The company subsequently suffered significant financial losses that it attributed to lost productivity, and its stock value dropped 41% after reporting losses in the second quarter of 2010.
- **Loss of jobs:** Chipotle Corporation fired more than 80 workers in Minnesota in December 2010 as the apparent result of an ICE audit. The fired workers were not given an opportunity to correct any alleged problems with their work-authorization documents, and the firings including many long-time workers who had worked at Chipotle for up to 10 years.

At another Minnesota company, ABM, 1,200 janitors who were members of a local union lost their jobs in 2009 as the result of ICE I-9 audits. The company itself was not fined.

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- **High Fines for Paperwork Violations:** Abercrombie & Fitch, a large clothing company, recently paid a \$1.047 million fine to settle a 2008 audit case in which it was charged with technology-related deficiencies in its employment-verification system. ICE stated that it had discovered no knowing hires of undocumented workers by the company and that it would not make public what software was responsible for the fine.
- **Impact on Small Business:** In January 2011, as the result of an ICE investigation, a small Iowa dairy farmer with a herd of 300 cows pled guilty to knowingly hiring three undocumented workers at his farm from 2001 to 2006. His company was also charged with “harboring illegal aliens for commercial advantage or financial gain.” The farmer currently awaits sentencing and faces a possible six months of imprisonment and a \$3,000 fine per worker. His dairy company faces a possible fine of up to \$500,000.

## Proposed Principles for Effective Immigration Worksite Enforcement

Worksite enforcement can and should be conducted in a professional manner and should be consistent and faithful to the priorities that the enforcement agencies have set out. The following principles should guide immigration worksite enforcement actions against U.S. employers:

1. **Accountability to Priorities:** Immigration enforcement actions should reflect the stated priorities of the agency to protect critical infrastructure and target abusive or exploitative employers.

There are approximately 150 million people in the U.S. civilian workforce, of whom about 16% are foreign-born. U.S. employers are thought to number approximately 7 million, of which 238,000 are currently enrolled in E-Verify. There are approximately 522 ICE worksite-enforcement personnel. It is clear that immigration worksite enforcement must be carefully and clearly calibrated to agreed-upon national priorities in order to be effective.

ICE’s stated priorities are ones that most Americans would embrace. ICE must be held accountable to ensure that its actions match its stated priorities. The following questions can help assure accountability:

- Are enforcement actions targeted at employers who form the most important part of our nation’s “critical infrastructure”?
- Are ICE personnel being given clear guidelines as to what facilities are considered part of our nation’s “critical infrastructure”—airports, seaports, nuclear plants, chemical plants, and defense facilities?
- How many of ICE’s reported worksite-enforcement actions have taken place at such facilities in any given reporting period?
- Are ICE personnel working strategically with Department of Labor Enforcement personnel to assure that employers who are the most abusive or exploitative are held accountable for both immigration and labor-law violations?
- Are ICE personnel being given clear guidelines as to what constitutes employer abuse and exploitation, including but not limited to documented wage, hour, and safety violations, harassment of workers, the payment of workers in cash, forced substandard housing of workers, and other compelling indicators of abuse?
- How many of ICE’s reported worksite-enforcement actions have resulted in prosecution for labor-law violations in any given reporting period?

2. **Accessibility of Information:** Employers should be provided with the information and guidance they need to comply with the law.

- **Guidance regarding I-9 corrections:** In anticipation of, or in the course of, an I-9 audit, employers may correct technical deficiencies in their documents. Yet ICE has refused to

provide any guidance to its own field or to employers as to acceptable and best ways to correct common errors. ICE has stated that “We will let a judge determine what correction approaches are reasonable.” Such a position does nothing to assist employers in complying with the law.

- **Standards for substantive I-9 violations:** Employers have requested guidance as to which categories of I-9 deficiencies are considered “technical” and which are considered “substantive.” One proposed standard is that substantive violations are those where an I-9 error could have led to the hiring of an unauthorized worker. ICE has not yet provided much-needed guidance on this important issue.
- **Standards for electronic I-9 systems:** The Internal Revenue Service (IRS) has established standards by which vendors may obtain government approval for their software systems. ICE has refused requests to establish any standards for electronic I-9 software systems, yet it has fined a major U.S. corporation more than \$1 million for deficiencies in one such system. Reasonable standards should be provided to guide employers who wish to streamline their I-9 record-keeping with available software programs.

3. **Uniformity and Consistency of Enforcement Standards:** U.S. employers range from small businesses to large multinational corporations that employ workers at multiple locations throughout the country. Uniform and consistent standards for employment verification are needed so that companies may efficiently and effectively comply with the law.

- **Technical vs. substantive paperwork violations:** Employers must be confident that harmless technical errors in one local ICE jurisdiction are not considered to be substantive violations that are subject to fines in another jurisdiction. For example, a company that conducts a self-audit may find that workers in a number of company facilities have signed their I-9 form above the signature line, instead of in the signature box on the form. It is burdensome for the employer to have to correct the I-9s. But while some ICE auditors may consider such an error harmless and meaningless, others may charge such an error as substantive. The agency must provide uniform and consistent standards to all of its personnel in determining what paperwork deficiencies are merely technical and what are substantive. The doctrine of “substantial compliance” should inform such standards, and they must be enforced with respect to ICE auditors.
- **Uniform and consistent standards regarding forms requirements:** Employers may have used the wrong edition of an I-9 form. ICE guidance treats this as a technical deficiency that can be cured, yet provides no guidance about the manner in which the error must be corrected. Does a new I-9 have to be executed? Can the employer keep the old edition of the form, but insert additional required documents if the new form requires such documents? Uniform and consistent standards about issues related to I-9 forms are needed.

4. **Proportionality of Sanctions:** Enforcement penalties should be set in a manner that induces compliance rather than at rates that are unduly punitive.

- **Business continuity:** The fine structure for technical and substantive paperwork violations, as well as for the knowing employment of unauthorized workers, is set according to a fine schedule established by statute. However, ICE agents and auditors have a great deal of discretion in determining which violations are fined, if any. While ICE may have an interest in making an example of certain employers, as a deterrent to others, fines should not be set at a level that threatens to put a company out of business.
- **Seriousness of violation:** In the absence of needed guidance and uniform standards noted above, similar violations may be sanctioned at wildly different rates by different ICE personnel. The seriousness of the violation should be taken into account in determining sanctions, under uniform guidelines promulgated by the agency.

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- **Exercise of discretion:** The fine structure under which ICE operates includes an “enhancement matrix” which may be used to enhance or mitigate a recommended fine. ICE should provide guidance to its agents and auditors about the proper exercise of discretion in the application of enhancement and mitigation factors in the setting of fines and sanctions. Business continuity and the impact of business closure on the community are factors which should be taken into account.

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