

PUBLICATION

I-9 Audits Return, Verification Expands

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While promising to continue its strategy to increase raids and prosecutions of companies it claims have knowingly hired large numbers of unauthorized workers, U.S. Immigration and Customs Enforcement (ICE) has signaled a plan to expand random and targeted audits of employers' I-9 forms that reflect the employers' federally required efforts to screen out unauthorized workers. This comes as pressures intensify on many fronts toward electronic employment verification.

Speaking at an American Bar Association legal conference called the "Homeland Security Institute," ICE Assistant Secretary Julie Myers stated that in 2008 there will be "a lot more I-9 inspections of employers." Baker Donelson's Immigration Group chairman Robert Divine, former first Chief Counsel of U.S. Citizenship and Immigration Services, was also a speaker at the Institute, held in Washington D.C. on January 17 and 18.

ICE had openly abandoned the use of audits and administrative fines for employers' technical non-compliance with I-9 procedures on the theory that employers seeking to make money from knowing employment of illegal workers will just build such fines into their cost of doing business. Instead, ICE has focused its limited but rapidly increasing worksite enforcement resources on raids and prosecutions in order to achieve the maximum deterrent effect through well-publicized convictions of managers and companies and seizure of company assets, as well as business interruption losses from removal of large numbers of workers.

These actions are part of a larger no-nonsense enforcement strategy articulated with increasing clarity by Homeland Security Secretary Michael Chertoff, who has started making "State of Immigration" speeches describing the multi-faceted efforts by the Department's various components to rebuild confidence in the government's willingness and capability to conduct practical immigration enforcement, while working administratively to streamline and expand legal immigration under existing law and continuing to prove the case for more comprehensive reform. "We are not going to have a silent amnesty," Chertoff has stated.

The Departments of Homeland Security and Labor are working on regulations to simplify the processes for obtaining temporary H-2A and H-2B visas, but those will not have tremendous impact in light of the statutory numerical limitations on H-2B workers and the longstanding interpretation that limits both visa categories to seasonal and peakload jobs. DHS is working on a rule to expand the "optional practical training" work authorization enjoyed by college students from one to two years following graduation, but the statutory numerical limitations on the H-1B professional visa will continue to force them through an increasingly low-probability lottery for slots to stay and work here legally. Legislative solutions in this presidential election year seem dim.

Meanwhile, DHS has been pushing for a *de facto* national mandatory system of electronic employment verification while implementing the REAL ID Act's goal of a *de facto* national identity system to frustrate identity thieves who could themselves frustrate all verification systems. DHS has supported the array of states that have been enacting laws and policies that force employers to participate in DHS's "E-Verify" system in order not to lose state government contracts and business licenses, driving a truck through the "contracts and licenses" hole in the federal statute otherwise preempting state immigration enforcement laws. The Administration is readying a regulation requiring all federal government contractors to participate in E-Verify.

Knowing that workers who obtain high quality fake documents incorporating the identities of real Americans can evade even E-Verify, DHS is implementing authority to require more secure documentation for border crossings, even by Americans and Canadians, and to require more secure state driver's license and identity documents. Last week DHS finalized its REAL ID regulations, which reflected significant compromises on the rollout schedule and on substantive requirements imposed on the states, recognizing political realities. It also reflected an effort to end the REAL ID debate and chart a clear path toward a more integrated secure identification system making use of the much needed enrollment capability of state departments of motor vehicles. Over time, DHS will seek to limit the range of documents that can be used for I-9 and E-Verify purposes.

Mandatory national electronic employment verification will begin to put a premium on increasingly sophisticated document fraud operations (including efforts to subvert DMV workers and hack DMV databases) and will put pressure on the Social Security Administration's capability to resolve the many inaccuracies in its "Numident" database that trigger "no matches," causing inconvenience for truly authorized workers and their employers. Vendors will continue to expand their offerings of electronic I-9 and verification uploading systems that will increasingly integrate with background screening, hiring workflow, payroll management and enterprise information architecture.

How We Can Help. Baker Donelson's Immigration Team regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to participate in the E-Verify, SSNVS and IMAGE programs. We defend sanctions actions by ICE for paperwork and "knowingly hire" violations of I-9 rules, and work with our Litigation Department to litigate claims involving competitors based on employment of unauthorized aliens. We advise and defend employers and managers in criminal proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor & Employment Department and White Collar Crime Group. We provide advice and coordinate with U.S. and foreign tax preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed here and abroad. Working with our firm's International Group we advise concerning export licensing issues including deemed exports to foreign national workers. And, of course, we assist employers and foreign nationals in obtaining every kind of visa and immigration status.