

I N S I D E T H E M I N D S

Counseling Clients on Worksite Enforcement

*Leading Lawyers on Responding to
Government Investigations and Implementing
Effective Compliance Programs*



ASPATORE

©2010 Thomson Reuters/Aspatore

All rights reserved. Printed in the United States of America.

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors nor the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

Aspatore books may be purchased for educational, business, or sales promotional use. For information, please email West.customer.service@thomson.com.

For corrections, updates, comments or any other inquiries please email TLR.AspatoreEditorial@thomson.com.

First Printing, 2010

10 9 8 7 6 5 4 3 2 1

If you are interested in purchasing the book this chapter was originally included in, please visit www.west.thomson.com.

Strategic Client Response to Worksite Investigations

Nathaniel Wolf

Member

Mika Meyers Beckett & Jones PLC



ASPATORE

High-Profile U.S. Immigration and Customs Enforcement (ICE) Actions

Since 2006, the pace of worksite enforcement actions has risen drastically. High-profile cases highlight the government's renewed focus on enforcement.

Koch Foods

On August 28, 2007, in Fairfield, Ohio, ICE employees executed criminal search warrants on Koch Foods. ICE identified more than 180 Koch employees working at the Fairfield plant requiring further questioning, and administratively arrested more than 160 for immigration violations. ICE agents simultaneously executed criminal search warrants on Koch's corporate offices in Chicago. The enforcement actions were part of a two-year investigation based on evidence that Koch may have knowingly hired undocumented workers at its poultry processing and packaging facility.

Fresh Del Monte Produce

A federal grand jury returned indictments on June 27, 2007 against ten former workers of the Portland, Oregon facility who were arrested in conjunction with an ICE investigation. They were charged with possession of fraudulent immigration documents or security fraud. The facility was the site of a criminal search warrant executed on June 12, 2007, and a separate, court-ordered immigration enforcement action resulting in the arrest of more than 160 persons illegally present in the United States. ICE's six-month investigation into the fraudulent use of documents to illegally obtain employment at American Staffing Resources led to these indictments.

George's Processing Inc.

On June 20, 2007, twenty-eight employees of a southwest Missouri poultry processing plant were indicted on criminal immigration violations. They were arrested on May 22, 2007 at George's Processing Inc. in Butterfield, Missouri, after a two-year investigation. During that action, 136 persons were arrested and charged with administrative violations. Of those

criminally charged, twenty-seven were charged with aggravated identity theft and falsely claiming to be citizens of the United States in order to gain employment; eighteen defendants were charged separately with re-entering the United States after having been deported. One was charged with Social Security fraud.

Swift & Company

On December 12, 2006, more than 1,297 workers were arrested at Swift meat processing facilities in six states during an enforcement operation that was the result of an investigation of work-related identity theft. Of those arrested, 274 were charged criminally, 129 of them with federal crimes, the other with state crimes.

ICE Worksite Inspection Procedures

The first step in the common enforcement technique utilized by U.S. Immigration and Customs Enforcement is to send a notice of inspection to the targeted company. The purpose of the inspection is to determine whether the employees at the worksite are properly authorized.

The notice of inspection allows three days' notice prior to conducting a review of an employer's I-9 forms. Although ICE regulations require the provision of three days' notice, an employer may waive the three-day period if it wishes to do so. This is generally not advised and the employer should use the three-day period to organize and review its I-9 files. The employer should conduct its own annual I-9 audits because three days is not enough time to make corrections in the event of errors or omissions. If ICE finds irregularities or determines that some information is missing or improperly completed, it will issue a second notice of inspection. At that time, ICE generally requests a full list of all employees, which must include the employee's full name, date of birth, Social Security number, date of hire, and date of termination (if applicable).

Types of Information Sought by ICE

ICE will generally ask questions related to the employees who complete the I-9s, including their background, ethnicity, education, and tenure with the company. ICE will also request information regarding how the company recruits workers and its policies regarding the employment of relatives, and information related to whether any employees were laid off or fired in the last year, a description of the employee's former position, and the circumstances surrounding their termination. ICE will request the following documents to review:

- Forms I-9. The agent conducting the inspection will need true and correct originals of all Form I-9s for all current employees hired after November 6, 1986 along with copies of supporting documents—for example, sports, driver's license, Social Security card, birth certificate, permanent resident card, etc., maintained in the normal course of business. To facilitate this inspection, ICE will request that the employer alphabetize all originals of the Form I-9 and make a copy for ICE.
- Company payroll. The agent conducting the inspection will request a copy of the most current payroll, which should show the full name of each employee and the amount of each employee's paycheck and withholding tax deducted in alphabetical order.
- Employee information certification form. ICE will request an alphabetized list of all current employees hired after November 6, 1986 that indicates the date of hire, termination date (if applicable), and date of birth for each employee.
- Business entity questionnaire. The agent conducting the inspection will request the employer to submit a fully completed business entity questionnaire. This form will be provided by the agent. The business entity questionnaire seeks basic background information regarding the business including the names of the owners/partners, the business's gross or net income, and the business's corporate affiliations.
- Form DE-6 (Quarterly Wage and Withholding Report). The agent conducting the inspection will request that you give him a copy of Form DE-6 Quarterly Wage and Withholding Report for the most

recent fiscal year. The regulations provide for just the surrender of the I-9s. However, ICE does have subpoena authority under federal regulations to collect evidence that is relevant to the investigation. Often the inspection notice and the supplemental instructions are accompanied by a subpoena compelling the production of these items as well as any Social Security “No-Match” Letters received over the past several years. An ICE subpoena is not self-enforcing; ICE must seek enforcement in federal court.

The business entity questionnaire solicits financial related information and other data such as a listing of all company locations, work shifts, whether I-9s were inherited from a predecessor company, names of employees who complete I-9s, and names of company officers. Divulging some of this information is often intrusive and burdensome. An employer must assess the degree of cooperation that the employer desires and attempt to limit the scope of the request

Strategic Response to the Worksite Inspection

The best response to a worksite investigation is to comply with ICE requests within reason. The employer does have rights, however, that are discussed below. It is not advisable to waive the three days’ notice under most circumstances. The best response is a proactive response. Because there is insufficient time to organize all of the documents, such documents must be organized prior to any notice of inspection by the human resources staff. I-9s must be completed properly and all the related documentation must be included in the file. In addition, it is advisable to conduct annual audits of your I-9 files to make sure that any problems are dealt with in a proactive and timely manner. The most common mistake that a company makes in responding to a worksite enforcement situation is to be disorganized and to try to use the three-day notice period to correct mistakes. This results in confusion and errors.

The response process should be structured as follows:

- Review the scope of the I-9 inspection notice
- Determine if workforce will be notified of I-9 inspection
- Assess the state of the employer I-9s through audits, identification of deficiencies, and corrections of same
- Conduct review; complete employer and employee corrections, identify qualified personnel (both employee and paralegal) to assist
- Address steps to be taken to replenish workforce and hire legal replacements
- Interview executives and hiring managers
- Identify areas of strength and weakness and develop theme to defend, including strategy to improve future immigration compliance
- Engage criminal defense counsel, if needed
- Prepare for possible ICE raid
- Review and analyze ICE civil assessment and outline challenges to ICE fine determinations, alternatively determining criminal defense strategy
- Settle fines and penalties, or engage in pre-indictment criminal or plea negotiations
- Seek civil administrative appeal or criminal jury trial

Common Immigration Law Violations that Trigger Investigations

A number of circumstances can trigger investigations. The following scenarios describe ways in which ICE may be alerted to alleged immigration violations by employers:

- An employee is arrested, perhaps for speeding, and is interrogated by a police officer regarding his immigration status. The officer determines that the employee should be turned over to ICE, which then questions him about his employment, how he became employed with the company, whether any company representatives assisted in procuring false documents, whether the company has actual or constructive knowledge of his undocumented status, how

many other undocumented workers at the facility, and so on. The employee may, in exchange for temporary work authorization, agree to work as a confidential informant.

- The former HR manager (or unhappy HR specialist, or a recently demoted supervisor) believes that the company is not in compliance with federal law governing employment verification, feeling that the company workforce is riddled with unauthorized workers. She begins sending letters to ICE naming names.
- A company worker is terminated, and while applying for unemployment insurance tells the state clerk that his former employer did not withhold Social Security payments and federal income tax and that other employees did not complain because they were here illegally and preferred to be paid in cash anyway. This triggers an investigation by the state revenue agency, which also informs IRS. The U.S. attorney on that investigation notifies ICE, and they begin a joint investigation and prosecution of the company for tax violations, money laundering, and immigration violations.
- A disgruntled employee complains to ICE about his coworkers. ICE begins an investigation and charges the employer with employing unauthorized aliens.
- ICE receives information on its toll-free tip line and investigates via SSA records. The sixteen-month investigation results in criminal charges filed against the owner of the business, who is undocumented, and placing all eight employees in deportation proceedings.
- ICE conducts an I-9 inspection and discovers that many of the workers are using false documents or documents that belong to a deceased person, or a child or someone of the opposite sex, or of a different age.

Because there are so many unpredictable ways that ICE can become aware of potential worksite enforcement violations, counseling clients in a proactive manner becomes the most efficient, successful way to deal with potential immigration violations. By undergoing annual audits, an employer can uncover potential violations before it is too late.

Identifying Immigration Law Risks

Labor-intensive industries such as food processing, construction, textiles, and hospitality receive the most attention from ICE with respect to worksite enforcement. In addition, temporary labor companies that service those industries also tend to receive a great deal of attention. To determine the degree of risk, I ask whether the employer has a comprehensive policy on fulfilling verification requirements for workers on its job sites. Other questions: have the supervisors and management undergone any training in the law of documenting workers and their responsibility for completing I-9s? Does the employer have an explicit policy prohibiting the use of undocumented workers and are such notices placed at the job site? Does the company have a process for internally auditing I-9 files? If so, what is that process?

Worksite Enforcement and Employer Rights

With the passage of the Immigration Reform and Control Act of 1986 (IRCA), employers are required to have employees complete a government-issued employment eligibility verification form (Form I-9) to establish that the employee is authorized to work in the United States. When ICE issues a notice of inspection, it must provide for three days to surrender the I-9s. Notices are served either in person or sent by certified mail, and employees can easily seek more time to surrender the records—in some cases, one to two weeks. If the records are surrendered at the company, it is important to know that ICE is not authorized, without the employer's explicit consent, to roam the premises or interview employees. It is advisable not to allow any further intrusion into the worksite by ICE.

Role of the Immigration Lawyer in Worksite Enforcement

Immigration lawyers play a number of roles in a worksite enforcement situation. Once a notice of intent is served, the immigration lawyer's job is to make sure that files are properly organized and that ICE receives all of the information that it is entitled to (and no more) so that it can conduct its investigation. An immigration lawyer should be involved in any questions that ICE might have for the employer and any follow-up requests for documentation. There are forms and procedures to follow and an

immigration lawyer can assist to make sure that the employer complies with the letter of the law. The immigration attorney should also have copies of all information that is submitted to ICE for inspection so that the immigration lawyer can conduct his or her own internal review in order to begin the process of making corrections as soon as possible.

A team comprising an attorney and trained paraprofessionals is required to represent a large employer that is served with an inspection notice. The attorney must focus on the larger picture and spend time interviewing executive officers and hiring managers in order to assess whether any civil or criminal liability exists. The attorney will inquire as to whether the company's managerial staff knowingly (through constructive or actual knowledge) hired or continued the employment of unauthorized aliens directly or through subcontractors. While the attorney is reviewing this information to make a determination, a team of paraprofessionals should be auditing I-9s and reporting their findings to supervising attorneys, who will make recommendations to management for corrective action. Time is of the essence, as I-9 inspections can move very quickly.

Counseling Objectives for Immigration Attorneys

The following are the top three objectives when counseling clients on worksite enforcement of immigration laws:

1. *Be Proactive.* The worksite enforcement raid is a very powerful tool utilized by ICE to ferret out I-9 and other immigration violations. Once that process is in place, it can move very quickly and ICE has significant authority to inspect an employer's records. Accordingly, it is important to take proactive steps in order to ensure immigration compliance. I recommend an annual or biannual audit of your I-9 records to ensure compliance and to fend off any possible claims that the employer knowingly hired unauthorized workers.
2. *Be organized.* It is important to be organized and to maintain appropriate I-9 files. I-9 files should only contain the information necessary in those files and nothing else. In the event of an ICE

raid, you have to have quick and easy access to the required documentation. It is important not to surrender any information that is not specifically required.

3. *Correct mistakes promptly.* On occasion, an I-9 is missing for an employee or there is some other technical error to the I-9 form. In those circumstances, it is important to note the I-9 deficiency and prepare a detailed corrective action report. To the extent possible, this should be done before the ICE inspection.

Effective Client Counseling Delivery Methods

Attorneys experienced in working with employers during worksite inspections have detailed checklists and other forms available to ensure that the information provided to ICE is organized, complete, and correct to the greatest extent possible. These practice aids include a format for noting I-9 deficiencies and corrective action that is required. In addition, work authorizations may not be updated, so the practice aids include a grid that notes expiration dates with call-up reminders. When counseling a client regarding an ICE inspection, we must assume that ICE knows every word, deed, and action related to your company.

ICE does not knock on doors randomly. Its investigation will be “lead driven,” based on information received from an informant, a competitor, an employee, local or state agencies, or many other sources. Therefore, it is important that the attorney knows as much about the company’s immigration hiring practices as ICE. This begins through interviewing corporate executives and hiring managers. While I-9s can divulge some suspect trends, they are only one piece of the greater puzzle. The attorney must be aware of possible conflict of interest issues that arise when an attorney represents an employer and determines through the questioning of managers that the corporation and the managers each need their own counsel. However, at the beginning of the representation, one cannot make that determination without some basic information. ICE will not be conducting the raid at the lawyer’s office. The ICE employees will be using their eyes and ears to gather as much information about the company as they can. Therefore, it is important that the attorney also obtain the same perspective and be on-site during the investigation.

Conclusion

On July 1, 2009, U.S. Immigration and Customs Enforcement issued 652 notices of inspection to businesses in order to audit I-9 records that contain information regarding an employee's right to work legally in the U.S. This announcement was a substantial departure from previous enforcement mechanisms. In the entire fiscal year of 2008, ICE issued 503 similar notices throughout the entire year. A large percentage of businesses targeted involved companies with fewer than one hundred employees and fell into a wide range of categories, including manufacturing, restaurants, construction, farming, and trucking.

The Obama Administration's focus on pursuing employers that break the law is a significant shift from the previous administration. Under the Bush Administration, the focus was on high-profile raids that resulted in mass deportation of unauthorized workers. The new administration has been candid that it will focus on punishing employers who break the law. This new focus has already resulted in a \$40,000 fine against Krispy Kreme for its improper hiring practices and a federal indictment in South Carolina against two human resources officers accused of knowingly hiring unauthorized workers.

Increased enforcement activity has only just begun: the diligent employer will be proactive and conduct internal audits to ensure that a meaningful immigration compliance policy is in place, and to uncover potential liability such as identity theft, use of fraudulent documents, careless completion of I-9 forms, or evidence of the knowing hire or continued employment of unauthorized workers.

Nathaniel Wolf, a member of Mika Meyers Beckett & Jones PLC, practices in the areas of commercial litigation, employment law, immigration, and landlord tenant law. He is a member of the American Bar Association, the American Association of Immigration Attorneys, the State Bar of Michigan, and the Grand Rapids Bar Association.

Mr. Wolf received his Bachelor of Arts in business administration/pre-law from Michigan State University in 1994. He attended Wayne State University Law School, where he was a member of the Moot Court National Team. Mr. Wolf received his law degree from Wayne State University Law School, cum laude in 1997, where he was elected to the Order of the Coif. Before entering private practice, he served as a law clerk for Chief Judge Lawrence P. Zatkoff on the United States District Court for the Eastern District of Michigan.

In addition to practicing law, Mr. Wolf has taught immigration law at the Thomas M. Cooley Law School in Grand Rapids. He has also taught employment law and business law at Davenport University. He is a frequent speaker at seminars on various legal topics, including employment law, business law, privacy rights, landlord-tenant law, and immigration. Mr. Wolf has also written several articles on various employment and commercial law issues.



ASPATORE

www.Aspatore.com

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. C-Level Business Intelligence™, as conceptualized and developed by Aspatore Books, provides professionals of all levels with proven business intelligence from industry insiders—direct and unfiltered insight from those who know it best—as opposed to third-party accounts offered by unknown authors and analysts. Aspatore Books is committed to publishing an innovative line of business and legal books, those which lay forth principles and offer insights that when employed, can have a direct financial impact on the reader's business objectives, whatever they may be. In essence, Aspatore publishes critical tools for all business professionals.

Inside the Minds

The *Inside the Minds* series provides readers of all levels with proven legal and business intelligence from C-Level executives and lawyers (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. Each chapter is comparable to a white paper or essay and is a future-oriented look at where an industry, profession, or topic is heading and the most important issues for future success. Each author has been selected based upon their experience and C-Level standing within the professional community. *Inside the Minds* was conceived in order to give readers actual insights into the leading minds of top lawyers and business executives worldwide, presenting an unprecedented look at various industries and professions.



ASPATORE