



WHAT'S AHEAD FOR LEGISLATION IN 2007



The best candidate for new employment-related legislation on the federal level in 2007 is an increase in the federal minimum wage. On January 10 of this year, the U.S. House passed a bill 315-116 to raise the minimum wage from \$5.15 an hour to \$7.25 per hour in 3 steps over 26 months. The bill would increase the minimum wage to \$5.85 an hour 60 days after being signed into law, a year later it would go to

\$6.55, and the year after that to \$7.25. The Senate is expected to modify the bill and add tax incentives for small business. President Bush is unlikely to veto such a measure, particularly if tied to some tax incentives for small business. Less than 10% of the work force will be directly affected by a federal minimum wage increase, because many employers pay more than the minimum wage . . ."

Concerning health care, most of the federal proposals that have reasonable chances of passage include health information sharing and various forms of health care coverage mandates. Most of the significant health care legislative changes are currently taking place at the state level, as a number of states are trying new ways to extend healthcare

Patty Wheeler

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insurance for low-income employees. The states particularly active in new state legislation in this regard include Massachusetts, Connecticut, Arkansas, Kentucky, Montana, Utah, and California. Others are likely to follow.

There will be a number of legislative proposals to revise the Family and Medical Leave Act. There will likely be minor extensions of coverage of the law with perhaps some simplification to benefit employers. Legislation to require some form of paid sick leave will be proposed but not passed.

Regarding immigration, a compromise is likely on some type of bill similar to that supported by President Bush and passed by the Senate last year. Such legislation would continue to expand the use of temporary guest worker provisions, expand visa options for skilled workers, but require additional verification of immigration status. The hot button here is what type of "amnesty," if any, will be contained in the bill so that workers currently in the country illegally will have some options other than immediate and permanent deportation.

With the new Democratic majorities in both the House and Senate, a number of other controversial bills will be introduced, including a bill making union recognition easier. The legislation supported by organized labor would force employers to recognize a union when a majority of the company's workers sign union cards saying they want to join. Secret ballot elections would no longer be required. While such legislation is likely to be offered and gain some attention, it is unlikely to pass and if passed, it would likely be vetoed by President Bush.

KNOW YOUR ATTORNEY

Fred Bissinger



FREDRICK J. BISSINGER is a Member of the Nashville, Tennessee office of the firm, which he joined in 1999. His law practice includes an emphasis in employment discrimination and wrongful discharge litigation, ADA and FMLA compliance, workers' compensation and general liability. He received his Bachelor of Science, cum laude, in Economics from Washington & Lee University and his law degree from the Seton Hall University School of Law. Prior to entering private practice, Mr. Bissinger served in the United States Navy Judge Advocate General Corps from 1993-1997. Mr. Bissinger is a member of the Tennessee Bar Association and the Mid-South Workers' Compensation Association.

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IMMIGRATION ENFORCEMENT STATUS UPDATE



Jerry Pinn

"While the same basic legal requirements have been around for many years, enforcement policies have changed dramatically over the past 12 months, and are still in the process of developing."

Immigration enforcement issues continue to make the news, and vitally affect many employers. While the same basic legal requirements have been around for many years, enforcement policies have changed dramatically over the past 12 months, and are still in the process of developing. Some of the

developments relate to the fact that there is a great national interest in immigration enforcement (some would argue it is a politically motivated interest), and the Administration seems interested in promoting a pro-enforcement image in order to secure a legislative compromise that would provide some solution. Further, many of the leading immigration enforcement government officials are relatively new in their positions and developing their own approaches.

The Background To The Swift Raids

The most dramatic application of the changing winds of ICE enforcement policy were demonstrated in the ICE raids of Swift meat packing plants in 6 states on December 12, 2006. Swift had been participating in the federal Basic Pilot Program since 1997, and had even been charged by the federal government in the past of checking the documents of applicants too closely. Swift had established an anonymous hotline, to which employees could provide confidential information on potentially unauthorized employees, and had instituted regular reviews of the I-9 forms and related paperwork. By many accounts, it appeared to a model corporate citizen.

In early 2006, however, a county sheriff called ICE to report that he had locked up a number of persons charged with crimes, and had checked their immigration status and found them to be unauthorized. He called ICE and asked them to come pick them up. During the process, ICE agents interviewed these persons and found that virtually all of them worked at a Swift plant. ICE initially issued administrative subpoenas for the I-9 forms for all employees at Swift's Iowa facility, and subsequently followed by similar subpoenas to the company's other plants.

Concerned about ICE's investigation, Swift took even further steps to evaluate its hiring practices to determine what steps, if any, should be taken to ensure compliance. Swift retained outside immigration experts to review the company's I-9 files and its hiring practices, and requested that ICE permit the company to more closely review the allegedly questionable I-9 forms to determine whether signs of identity fraud existed and whether any of these forms were tied to unauthorized workers.

In spite of Swift's efforts, ICE informed Swift that it was going to conduct a raid at its plants. Swift told ICE that a raid would directly impact many

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legal workers, as well as suspected illegal workers, and would irrevocably harm Swift by interfering with its legal business operations and by damaging its reputation. Swift estimated that as many as 40% of its employees might be removed in the enforcement action and the disruption of its operations could result in a \$100 million loss to Swift. Swift offered to cooperate with ICE in a phased or managed process that would accomplish ICE's goals without placing an unnecessary financial and operational burden on the company.

Swift Sues ICE

ICE refused to agree to Swift's review procedures, so Swift pursued a federal court lawsuit attempting to enjoin ICE's planned raid. ICE informed Swift and the court that it planned to shut down 6 of Swift's 7 plants in December so that ICE agents could interview every employee, regardless of suspected illegal status. Swift asserted that ICE's plan, or any comparable mass action, constituted a violation of the immigration laws, as a federal statute prohibits ICE from imposing penalties on Swift for actions taken on information provided through the Basic Pilot confirmation system. Swift further asserted that a mass removal action by ICE would be an unconstitutional deprivation of property without due process of law because Swift had a protected property interest in operating a legitimate business.

ICE Responds To Swift's Lawsuit

In ICE's official response in opposition to Swift's legal action for an injunction, ICE stated that there is no legal right for anyone to continue violating the law, and that the government need not work on a potential law violator's timetable. Regarding Swift's proposals to pursue the investigation in a phased method, ICE contended that proceeding in the manner proposed by Swift would enable a substantial number of illegal employees and the perpetrators of identity theft to avoid detection. ICE stated that participation by an employer in its Basic Pilot Program is not a limitation on a workplace enforcement action, and that no constitutional right requires the government to provide notice of a planned law enforcement action to a company that may be violating the law.

Judge Denies Swift's Requested Injunction Against ICE

On December 7, 2006, the United States District Court Judge for the Northern District of Texas denied Swift's motion for a preliminary injunction against ICE. The judge stated that nothing in the Basic Pilot Program or the statute prevented ICE from causing disruption of business and economic damages by conducting a mass removal enforcement action. The judge commented that the current Basic Pilot Program does not check Social Security or IRS databases to determine if a particular Social Security number is already being used in another workplace. In weighing the various interests, the court concluded that Swift did not carry its burden of showing that the granting of the requested injunction would further the public interest, and that Swift had not proposed a procedure that would not be detrimental to important public interests and at the same time protect Swift from economic loss.

Raids Instituted and Swift Sued Under RICO

On the same day the order was issued denying the injunction, ICE shut down the Swift plants and conducted its raid. Unfortunately, the raids were not the end of Swift's problems. A few days later, Swift was sued in the same federal district court in Texas by several "legal" Swift employees, alleging violation of the Racketeer Influenced and Corrupt Organization Act (RICO). The suit in general alleged that Swift knew that they could hire illegal immigrants for less wages and at a cheaper cost than hiring individuals who had the legal right to work in the U.S., thus constituting an ongoing scheme to defraud those persons who had the legal right to work at Swift, including the plaintiffs. The plaintiffs seek three times the economic damages they suffered, an amount equal to all profits unlawfully earned by Swift, and punitive damages in the amount of \$23 million, plus other court costs and the like.

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Comments And Observations From Swift Raids And Current ICE Enforcement Policies

The Swift litigation establishes that participation by an employer in the federal Basic Pilot Program is not any kind of limitation on a workplace enforcement action or raid by ICE. Indeed, so many problems have resulted from the Basic Pilot, that ICE is now touting its next generation version, called IMAGE (Ice Mutual Agreement Between Government and Employers). Participation in the IMAGE program requires much more hands-on actions by ICE including submitting to an I-9 audit by ICE, establishing a self-reporting procedure for reporting to ICE any discovered deficiencies, submitting an annual report to ICE, as well as verifying the Social Security numbers of all existing employees as well as all new hires.

Very few employers have signed up for the new IMAGE program, and initial experiences have been controversial. The best example was at Smithfield Foods, where Smithfield identified some 600 mis-matches at its North Carolina facility, and began the process of terminating these employees. A union organizing campaign was in process, and the union seized upon the issue to call a strike among Hispanic employees that resulted in a temporary plant shutdown. A resolution was negotiated between representatives of the company and representatives from the Catholic church, Smithfield sought permission from ICE to rescind the terminations. Apparently because Smithfield was on the IMAGE program, ICE allowed Smithfield to apply the proposed new ICE mis-match regulation, which sets forth consecutive 30 days periods in which the employer and employee attempt to resolve Social Security mis-match. After 60 days if there is no resolution, employees are given an additional 3 days to fill out a new I-9 form, utilizing a different Social Security number.

Another lesson from the Swift situation, is that no amount of good-faith or protective measures instituted by an employer can insure itself from an ICE enforcement action or raid. However, there are various types of situations or factual patterns that generate ICE's attention, subsequent enforcement actions, and raids, and employers should be aware of those situations and avoid them to stay out of ICE's path. In addition to evidence of company knowledge of illegal activities, the presence of large-scale counterfeit rings, illegal labor trafficking, or even general criminal activities among employees generate attention from ICE. Many plants are currently experiencing counterfeiting of paychecks, and one wonders whether this is something that might draw ICE's attention in the future. One thing is for sure, is that "identity fraud" is the topic of the day at ICE, where illegal immigrants simply use the name and Social Security number of another person. However, ICE really has not decided how they are going to deal with this issue, as such persons will pass the Basic Pilot Program matching program verification.

In conclusion, the basic points to avoid ICE enforcement action seem to be as follows. First, do everything possible to create the perception, as well as the reality, of a good faith effort to comply with the law. Even verbal admissions by employer officials have been used by ICE to conduct investigations and raids. Second, look for ways to show good faith compliance, such as by conducting internal audits, training, and the like. Third, avoid the type factual patterns that generate ICE attention and enforcement actions. Finally, don't get the idea that joining the Basic Pilot Program or IMAGE program is a "silver bullet" to ICE enforcement actions.

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