Over the last several months our firm has had many telephone calls and meetings with current and former officials of the Immigration and Naturalization Service (now Immigration and Customs Enforcement or ICE) dealing with the new enforcement policies and direction of the federal government. The conclusions about these policies and directions are the subject of this article, and represent the writer’s opinion.

How INS Has Changed

First, it is quite hard to determine easily what ICE is doing for various reasons. Many of the former INS officials who were involved in immigration enforcement are now gone. For example, this writer dealt with six (6) INS officials at one regional office over the years, as recently as 6 years ago, and all of them are now gone. In their place are not only new officials, but also officials from other parts of the government as a result of government reorganizations and the organization of the Department of Homeland Security. For example, many former customs officials are now responsible for immigration enforcement, and are new on the job.

Second, functions of the government pertaining to immigration are divided among various departments and subgroups of the Department of Homeland Security, and the old adage applies, “The right hand doesn’t know what the left hand is doing.”

How Targets Are Selected

Of particular interest to employers is the question of how targets are selected for investigation and/or prosecution. To a great extent, ICE enforcement officials rely on publicity, rumors, hot tips, and of course, informants and undercover agents to get their information and/or evidence for prosecution. For example, if a news account or other such information reveals something interesting about the large alien employment level at a particular plant or location, ICE may send someone to that location to investigate. ICE is particularly suspicious of an employer with a large proportion of alien employees, paying particularly low wages, in contrast to the relevant labor market in the area. In many cases, the person doing the investigation is an undercover agent, perhaps posing as an immigrant worker inquiring about how to acquire counterfeit documentation in order to gain employment at an employer. While ICE is looking for any company involvement and/or knowledge of the illegal counterfeiting activity, ICE will also pursue individual actions against the counterfeiting persons.
**KNOW YOUR ATTORNEY**

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**INSIDE INS continued from page 1**

In addition to trafficking in illegal aliens and/or counterfeiting documents, ICE is also interested in rampant criminal activity among alien workers. That is, if reports come to ICE’s attention that large numbers of an employer’s alien work force are engaged in criminal activities, even unrelated to immigration crimes, such as robbery, etc., an investigation may ensue in order to eliminate the criminal elements from the locality. In some cases, ICE may respond to complaints, news accounts, or tips, to investigate a particular employer’s situation.

**ICE Audits**

If the investigation reveals that the employer has a large illegal workforce, or employees engaged in illegal document counterfeiting and/or other criminal activities, ICE may contact the employer and come in and conduct a complete immigration audit. The audit will include not only the checking of all I-9s, but also may (but not always) include checking of Social Security and/or alien registration numbers to determine whether they are mis-matches. Sometimes such audits of mis-matches will be done only on a random basis, and if the proportion of mis-matches is not high, no further review of mis-matches will be conducted.

If large numbers of mis-matches are found, the next critical issue is what ICE will do about those mis-matches. In general, the ICE is becoming increasingly concerned that it must direct termination of apparent illegals immediately, to avoid condoning the presence of illegals in the workforce, and setting dangerous precedents. However, there is a great deal of confusion here, in part because of the potential effect of the new proposed regulation regarding mis-matches issued by ICE on June 15 of this year, which are still proposed and have not yet been adopted as a final regulation. In general, the proposed regulation provides safe harbor procedures for employers to follow upon receiving notice of a name/number mis-match. The procedures first require the employer to within 14 days check the employer’s records to determine whether a discrepancy has occurred, and if no such error is found, to promptly request the employee to determine if the name and social security number in the employer’s records are correct. If they are correct according to the employee, the employer is supposed to request the employee to resolve the discrepancy with Social Security. In the event that nothing happens within 60 days of receiving initial notice of the mis-match, and the employer does not verify that the employee’s name matches Social Security’s records, the employer is supposed to within 3 additional days verify the employee’s employment authorization and identity by completing a new I-9 form, but applying slightly different procedures from the initial I-9 form. In general, the additional procedures cannot contain the same Social Security number that is the subject of the prior mis-match notice, and no document without a photograph may be used to establish identity or both identity and employment authorization.

If these new proposed regulations are applied to an ICE immigration audit, then there is tension between the applicability of the new regulations and ICE’s general preference for simply telling the employer to terminate the employees. In the latter situation, ICE will require an employer to give those subjects of mis-matches the opportunity to come in and meet with ICE officials to show their legal status, and if they do not appear, they are terminated. ICE has not yet finally decided how to handle the effect of the new proposed regulation. In some cases, it

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is possible that the situation could be affected by the relative
diligence of the employer in complying with the law, and
whether massive terminations will devastate the employer
and/or the local community.

Effect of Political Environment

Another “wild card” in the entire situation is the political
environment. The immigration law has basically not
changed since 1986, and yet the enforcement policies have
varied dramatically. For a period prior to the Clinton
Administration, there were a number of well-publicized
“raids” across the country in which government buses
hauled off large numbers of illegal workers. During the
Clinton Administration, there basically was no work site
immigration enforcement. Now, with the immigration
issue becoming the political issue of the day, the Bush
Administration intends to show the public that it is
vigorously enforcing the immigration laws, in part to
courage passage of a compromise immigration bill in
Congress. No one really knows what the situation will be
after the federal legislative bill is resolved.

Some employers have attempted to use political influence
to avoid disastrous consequences in immigration actions.
This is a subject of strong disagreement as to whether the
use of politicians is helpful or not. In some cases, if the
appropriate tact is used, involvement by politicians has
been helpful. However, in today’s political environment,
very few politicians are willing to render assistance.

Criminal Prosecutions

ICE has started to utilize criminal prosecutions and
forfeiture of assets as a remedy, in lieu of civil fines. In
almost every case, such severe prosecutions result from
the use of undercover agents to gather “smoking gun”
evidence, i.e., direct evidence of criminal involvement by
the employer in promoting or condoning counterfeiting
of documents and illegal trafficking. ICE is particularly
interested in any involvement in such actions by human
resource personnel. In general, it is actually a good sign
if ICE officials come to the plant and hold meetings with
the employer and the like, as when criminal prosecution is
contemplated, ICE usually stays out of such direct contact
with the employer and turns the matter over to federal
prosecutors.

Pilot and IMAGE Programs

It should be noted that ICE is going to be increasingly
“pushing” its federal pilot program, as well as possibly
the new IMAGE program announced by ICE on July 26,
2006. It is beyond the scope of this article to discuss
the advantages and disadvantages of the pilot program,
but the writer believes companies should exercise due
diligence before joining the program. The IMAGE
program is so new that even ICE has little information
about it, but it is deemed to be sort of a “best practices”
certification of an employer. ICE touts that its pilot
program will go a long way to protecting an employer
from immigration charges and workforce transitions
resulting from ICE enforcement.

Employer Strategy

This article would not be complete without discussing
how some of the information gleaned from ICE
officials, can affect employer strategy. Only a few select
comments will be made, as a full discussion is beyond
the scope of this article.

One conclusion is that if an employer should ever
get information that any of its managers, supervisors,
human resource employees, or even rank and file
employees, are engaging in illegal counterfeiting or
other criminal activities, appropriate action should
be taken. In some cases, it may be appropriate to
terminate such a person, even under circumstances
where full proof is unavailable, due to the urgency of
the issue. Obviously, advice of counsel is necessary, due
defeat discrimination and defamation issues.

A couple of comments will be made regarding I-9
record-keeping procedures. First, it is probably a
good idea to keep I-9s in separate files, separate from
personnel files. One reason is that it facilitates ICE
review without allowing them into an employer’s
personnel files, and another is that it facilitates
employer self-audits and corrections.

Another extremely controversial issue pertains to the
copying of the documents provided to complete the
I-9 form. This writer has traditionally recommended
that employers keep copies of such documents, to
verify that they looked at the documents, and to show
their good faith. However, a number of ICE officials
have described in depth some of their investigatory
techniques. It was pointed out that an ICE official
might confront the Human Resource Department
employee who completes the I-9s, the various
similar documents showing the print or font
or some other detail on the documents to vary,
“threatening” the human resource employee that
under the circumstances that documents could
not appear to be genuine. These countervailing
corns probably can be resolved by use of
electronic signing and retention of Form
I-9 in accordance with recently
promulgated regulations.
IN-HOUSE COMPANY ATTORNEYS URGE LIBERAL APPLICATION OF FMLA

A group of in-house company lawyers at a recent meeting of the American Bar Association, discussed their approach towards complying with the Family & Medical Leave Act laws. Many of the panelists argued for a liberal application of the law as the “best practice.” These counsel argued that it makes better sense to allow the leave and then make sure it is managed properly, than to quibble with employees over whether the situation meets the FMLA standard. Similarly, regarding requests for leave to attend to a sick or injured family member, many of these counsel take the approach that if a doctor certified the family member as sick or injured, that generally should be enough.

All of the counsel agree that employers should insure that the employee provides the necessary certification. In cases of suspected fraud or abuse of FMLA leave, some counsel admitted to, on occasion, hiring a private investigator to track an employee’s movements and activities. Such an approach should be used only “as a last resort,” because it may not be well received by a judge or jury.

All of the panelists agreed that managing intermittent leave is probably the most difficult part of FMLA compliance. The general recommendations included an effective technology program for tracking intermittent leaves as such leaves are always going to intersect with attendance policies, and documentation is important to head off conflicts.

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