

New Crackdown on Employers of Undocumented Immigrants

By Christopher A. Kerosky

This month the Obama Administration announced a new policy of more aggressively pursuing prosecution of employers of illegal immigrants, changing the focus and methods of the Bush administration. The policy was recently implemented following a worksite raid; in that case, the undocumented workers apprehended were later released from custody and given temporary status so that they could testify in a criminal case against their employer.

It coincides with new government efforts to target employers who hire undocumented workers indirectly, through independent contractors, rather than putting them on payroll. Employers like Walmart who hired subcontractors with illegal workers are now being hit with punitive fines and prosecution.

Going After the Boss.

Starting in 2006, U.S. Immigration and Customs Enforcement (ICE) initiated stepped up enforcement against employers of the undocumented. ICE began aggressively bringing criminal and civil cases against employers and even seizing corporate assets.

Last year, 863 employers of illegal workers were arrested on criminal charges and over \$30 million in fines were imposed. Federal prosecutors began to charge employers with money laundering, harboring of illegal aliens, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). Courts have approved the use of federal laws creatively to prosecute those who hire illegal workers. One appeals court recently upheld a conviction of an employer for “harboring” an illegal alien if the employer had “knowledge or reckless disregard of the alien’s unlawful status.”

Employers are now routinely being prosecuted under another criminal statute which prohibits the “practice of hiring or continuing the employment of an unauthorized alien.”

Hiring Subcontractors Who Hire the Undocumented.

ICE has also begun to fine and prosecute companies who do not hire the undocumented worker directly, but through “subcontractors” who perform tasks such cleaning and maintenance, farm labor or construction. An ICE raid against a Kentucky construction developer, Fischer Homes, resulted in the arrest of 76 undocumented workers and the prosecution of six company supervisors for “conspiracy” and “harboring illegal aliens”.

This was true even though the workers were *not* on the payroll of the company, but rather paid by subs hired by Fischer. The company was charged with knowingly using subcontractors to avoid compliance with the requirement to employ only workers with proper work authorization.

The same argument was made against Walmart, who hired independent contractors to clean their stores. The contractors routinely employed undocumented immigrants to do the cleaning. The

federal government took the position that the megacompany was legally responsible for the widespread use of store cleaning staff without work permission. Although Walmart contested the charges, they agreed to pay an \$11 million fine and change their practices.

It is now clear that simply hiring through subs or independent contractors does not absolve you of liability under the immigration law.

Obama Administration Employs New Tactic Against Employers of Illegal Immigrants.

President Obama repeatedly stated in his campaign that he would be even tougher against those who hire undocumented immigrants. The first changes in Department of Homeland Security (DHS) policy are already evident in his first 100 days in office.

In February, Secretary of Homeland Security Janet Napolitano reversed past ICE policy in the handling of a raid on an industrial employer in Washington state. When she learned of the raid after the fact, Napolitano released the arrested illegal immigrants, gave them temporary status and work permission, and enlisted them to testify against the company that employed them. This represents a new tactic in the handling of such raids by the federal government. During the 8 years of the Bush Administration, undocumented workers were almost always arrested in raids and subsequently deported, some after being prosecuted for identity theft for using others' social security numbers. It was often difficult to prosecute the employers without the workers around to testify.

In the new guidelines just announced, the Department calls for more severe fines and criminal prosecution against employers found to violate these laws. The directives instruct ICE field offices and agents to focus on employers and supervisors. Moreover, they suggest the approach used in Washington may be employed more often: use the workers themselves to help prosecute their bosses.

“Enforcement efforts focused on employers better target the root causes of illegal immigration” according to the new guidelines. “ICE must prioritize the criminal prosecution of actual employers who knowingly hire illegal workers because such employers are not sufficiently punished or deterred by the arrest of their illegal work force.”

Napolitano warned in an interview last month that the agency would increase their auditing of employers internal records including the I-9 forms that are supposed to be filled out when hiring a new employee verifying that the person has the right to work. She even suggested that ICE would use illegal workers as undercover informers to implicate their bosses. “What I want to do is deter more employers from intentionally and knowingly hiring illegal workers,” she declared.

What This Means for Employers.

Employers should heed the clear message sent by federal authorities: they are going after those who hire immigrants lacking proper documentation of their right to work. Especially in these tough economic times, one should expect this type of aggressive workplace enforcement of immigration laws to increase with time.

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