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ICE'S WORK-SITE ENFORCEMENT CONTINUES DESPITE NEW PRIORITIES, PRACTITIONERS SAY

By Laura D. Francis
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The Obama administration is continuing its ramped-up work-site enforcement of immigration laws, despite its attempt at providing deportation relief for undocumented workers, practitioners said June 4.

Speaking during a conference call sponsored by ImmigrationWorks USA, Fragomen, Del Rey, Bernsen & Loewy attorney Dan Brown said not only are Immigration and Customs Enforcement audits up in the past five years, the level of fines being imposed also has "significantly ratcheted up."

Brown said ICE conducted about 500 audits of employers' I-9 employment eligibility verification forms nationwide in 2008, but that number has jumped to about 3,000.

Not only that, but the government is "getting better" at conducting the audits, meaning that ICE can perform them more efficiently and is better able to audit large employers, Brown said.

"ICE audits are still going on even if there's all this talk about giving relief to the individual undocumented population," Brown said.

Other 'general trends' in enforcement

In addition, Brown said employers should be aware of other "general trends" in immigration enforcement.

For example, he said if an employer is using the E-Verify electronic employment eligibility verification system, "it's important that you ensure that you're following those rules and requirements very closely."

Brown said the Department of Homeland Security has set up a monitoring and compliance unit that looks at how employers are using the system. That unit will notify employers that are violating federal E-Verify rules and can conduct site visits, he said.

Furthermore, Brown said the DHS has vastly increased its referrals to other enforcement agencies based on employers' E-Verify use. Those referrals could be to ICE if there is a suspected employment verification violation, or to the Justice Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices if an employer potentially is violating the Immigration and Nationality Act's anti-discrimination provision.

"In the last fiscal year alone we saw a 100 percent increase in referrals," Brown said.

He added that the DHS is working on rules that would allow the agency to discipline employers for violating E-Verify program requirements, and they could be issued this year.

Also in the area of enforcement, Brown said part of President Obama's executive action on immigration, announced in November, was the formation of a working group comprised of ICE and OSC, as well as other enforcement agencies like the Labor Department, Equal Employment Opportunity Commission and National Labor Relations Board.

"There's going to be increasing referrals coming from ICE to the Department of Labor and those types of agencies," Brown said. "Having to deal with the ICE audit isn't going to be the end of the story; there's going to be more to come."

Fifth Circuit decision

The call also addressed the practical impact on employers of a recent decision by the U.S. Court of Appeals for the Fifth Circuit denying the administration's request to stay an injunction against its new deferred action programs (*Texas v. United States*, 2015 BL 164655, 5th Cir., No. 15-40238, *request for stay denied* 5/26/15).

That decision leaves in place a February federal district court injunction barring implementation of the deferred action for parents of Americans and lawful permanent residents (DAPA) program and expanded deferred action for childhood arrivals (DACA) program while litigation over their legality continues.

A Fifth Circuit hearing on the preliminary injunction itself is set for July 10.

"No matter who wins or loses" at that stage of the proceedings, it is "safe to say" there will be an appeal, possibly to the U.S. Supreme Court, Lynden Melmed of Berry, Appleman & Leiden said June 4. Therefore, he said, it is unlikely that the program will go forward at least within the next three to six months.

Greg Siskind of Siskind Susser said the three-judge panel that decided the motion for a stay has two of the "worst" judges from the Obama administration's perspective. In fact, he said, a different panel of the Fifth Circuit recently ruled the opposite way in a similar case, referencing *Crane v. Johnson*, 783 F.3d 244, 2015 BL 98146 (5th Cir. 2015).

Lou Moffa of Montgomery McCracken Walker & Rhoads said the three-judge panel that decides the injunction issue in July – which hasn't yet been selected – could be different from the judges who decided the stay motion. He said, however, that the same panel could be selected, and "if that happens, you know what the outcome's going to be."

Practical impact larger than legal impact

Speaking about the Fifth Circuit decision on DAPA and expanded DACA, Moffa said it "is more politically and practically important than it is legally important." The legal issues were "narrow and esoteric" and "not particularly important going forward," he said.

Practically, however, DAPA and expended DACA are on hold until a court rules on the merits, which hasn't yet happened, Moffa said.

Patrick Shen, who also practices with Fragomen, addressed some scenarios that could arise in workplaces where employees are eligible for the programs, but litigation over them continues.

For example, an employee may tell his or her employer that he or she is eligible for DAPA. The "harsh reality" in that situation, Shen said, is that the employer now has knowledge that the worker is undocumented and will have to terminate that person.

On the other hand, Shen said an employee who simply asks for his or her employment history hasn't admitted to any immigration violations, and an employer should "refrain from asking too many questions" so as to avoid having knowledge of the worker's status.

Shen recommended that employers implement an "immigration-neutral procedure" for employees who may need to request certain documents, which could be necessary for purposes other than immigration benefits, such as applying for a mortgage. Employees should be informed that they aren't required to provide any more information than necessary to obtain the documents, he said.

Siskind added that there is "nothing wrong" with putting information on a bulletin board about how to seek help from an immigration advocacy organization. Employees could be in blended families, and therefore have a spouse or other family member who is undocumented and in need of services, he said.

Siskind also suggested that employers consider providing free legal services to employees – not limited to immigration issues – that create a "wall of confidentiality" preventing the employer from obtaining any employee information disclosed while obtaining those services.

Continuing impacts of DACA

Pointing out that the original DACA program from 2012 still is in effect and not affected by the injunction, Shen said employers may still have to deal with a situation in which a worker lied about his or her identity or other information to get the job but now has employment authorization through the program.

If an employer has an honesty policy that allows the employer to terminate employees for lying about job qualifications and background, then a DACA recipient who admits to prior identity misrepresentations may need to be terminated, Shen said. The important point is, "you have to be consistent" in the policy's application or otherwise face claims of discrimination, he stressed.

Shen also said employers need to be mindful of state laws. In California, for instance, employers cannot take action against an employee who updates his or her personal information after receiving work authorization.

In situations in which an employer has a significant number of undocumented employees, the honesty policy should be written so that it applies only to specific misrepresentations and not those related to immigration status, Shen said.

Siskind said immigrants are continuing to apply for DACA under the original program. Because applicants must be over 15 to apply, there are still some 50,000 immigrants aging into program eligibility, he said.

"The odds are pretty good that once you're in the program you're going to be able to continue in the program for a long time," Siskind said. "There's no precedent for any president taking a major benefit away for a large group of people," and the leading presidential contenders for 2016 either have openly supported DACA or have been silent, he said.

Obama may get decision too late

Siskind also said he is optimistic that DAPA and the expanded DACA program eventually will be deemed legitimate, although with the way the litigation is progressing it likely will be the summer of 2016 "before we get some firm resolution on this."

But Melmed said the injunction has halted all administration preparations for the programs, including hiring, and there are natural challenges with starting a major program at the tail end of a presidential administration. It will be a "difficult decision" for the Obama administration if it gets the "green light" on the programs within the last six months of its existence, he said.

Brown added that one potential outcome of the litigation is that the programs would be legal only if implemented through notice-and-comment rulemaking, which would take even more time to get them off the ground.

Similarly, Moffa said the plaintiff states' legal argument is "weak," but "I think the clock is going to run out on this administration."

Shen suggested that the administration in the meantime may want to consult the Office of Legal Counsel again on ways to tailor DAPA so that it "would pass judicial scrutiny the next time around."