Immigration Directive Foreshadows Return of Worksite Enforcement

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Body

O n April 11, U.S. Attorney General Jeff Sessions issued a new directive on immigration enforcement titled "Renewed Commitment to Criminal Immigration Enforcement." The directive focused mostly on run-of-the mill re-entry and entry prosecutions-a staple for federal prosecutors on the border. The memo also mentions *8 U.S.C. Section 1324*, which addresses smuggling and harboring. It is also the core statute used for worksite enforcement cases, which are likely headed for a comeback under the new administration.

ICE's worksite enforcement program focuses on criminal prosecution of employers of undocumented workers. In 1986, Congress passed the Immigration and Control Reform Act, making it illegal to employ unauthorized workers. The law required employers to collect information on employment eligibility using a Form I-9 and imposed penalties for failing to do so. In the wake of 9/11, the worksite enforcement program initially focused on removing undocumented workers from critical infrastructure and government suppliers.

Before the worksite enforcement program, employing undocumented workers typically resulted in civil or administrative fines. Rarely were employers held criminally accountable. In 2009, Immigration and Customs Enforcement (ICE) (part of the Department of Homeland Security (DHS)) rolled out a new enforcement strategy for criminal prosecutions of worksite cases. ICE focused on companies that utilized unauthorized workers as a business model, mistreated workers, engaged in identity fraud, human trafficking or smuggling, laundered money, or participated in other criminal conduct. Some of the cases generated significant penalties for employers. For example, in December 2008, IFCO Systems entered

into a $20 million settlement for hiring unauthorized workers and several managers of the company later pleaded guilty to criminal charges. Other significant cases included Tysons Foods, Shipley's Donuts and Republic Waste.

In 2009, ahead of the wave of worksite prosecutions, now Attorney General Sessions called for greater worksite enforcement in a DHS oversight hearing. The cases dropped off in 2013 as President Barack Obama shifted prosecution priorities. And, in 2015, Sessions released a timeline critical of the Obama administration's immigration efforts, including scaling back worksite enforcement actions. Sessions' new directive makes clear that immigration enforcement (including worksite enforcement) will become one of the Department of Justice's priorities.

Worksite enforcement uses a big stick. Instead of using the misdemeanor framework that specifically focused on employment, prosecutors used the smuggling and harboring statute (*8 U.S.C. Section 1324*), that depending on the number of unauthorized workers, meant significant jail time for any employer charged with a crime. It is unclear whether the smuggling and harboring statute or the U.S. sentencing guidelines for harboring and smuggling (with its significant penalties) initially contemplated use against employers for hiring undocumented workers. There is a significant difference in culpability for an employer "harboring" undocumented workers by hiring and paying them to work, and "harboring" or "smuggling" undocumented workers in the back of a truck or other vehicle across the border. Should the law treat the two crimes similarly?

And the smuggling and harboring statutes have a lower standard of proof-instead of requiring knowledge, recklessness is sufficient (one of the few federal felonies that does not require actual knowledge). Because the smuggling and harboring statutes provide for asset forfeiture, funds paid by companies subject to prosecution went directly back to ICE as opposed to the black hole that is the Treasury Department (like most criminal fines). Asset forfeiture creates a significant incentive for ICE to prosecute the cases. Fines are calculated using various theories, including wages paid to undocumented workers or assets that facilitated the hiring. Current Department of Justice policy focuses on accountability for individuals. This means that an employer could face serious consequences if the worksite enforcement program is reinstituted, both in terms of potential fines and jail time.
Here are three things companies should do:

- Policies and procedures are key to any compliance program-employees need rules to follow. Companies should ensure that they have effective policies and procedures in place to deal with immigration compliance. At a minimum, the company's hiring process should include clear procedures on immigration screening to ensure compliance with immigration requirements both within and outside the United States. The government offers the free E-Verify program, which can help shore up immigration compliance screening of potential employees (over 600,000 companies now use the online tool).

- Once policies and procedures are in place, companies have to educate employees on expectations of the compliance program. To do so, companies should identify employees whose job description includes handling immigration issues (e.g., HR management) and provide training to those employees on the immigration process, potential issues, and appropriate responses.

- Once employees know what a good job looks like in terms of immigration compliance, monitoring execution becomes essential to program effectiveness. Companies should develop a plan for responding to compliance failures and conduct testing to ensure employees follow the rules. This could include auditing I-9s for technical and procedural errors and adequate documentation. The company should also make sure employees know how to confidentially report suspected unauthorized employment practices through a helpline or some other mechanism.

A company's immigration program depends on its business environment. Addressing immigration compliance and potential enforcement activity will help companies address issues proactively and minimize exposure in the event of a compliance failure.

This article first appeared in Corporate Counsel, an ALM publication. RYAN MCCONNELL and STEPHANIE BUSTAMANTE are lawyers at R. McConnell Group-a compliance boutique law firm in Houston with Fortune 500 clients across the globe. McConnell is a former assistant U.S. attorney in Houston who has taught criminal procedure and corporate compliance at the University of Houston Law Center. Bustamante's work at the firm focuses on risk and compliance issues in addition to assisting clients with responding to compliance failures.

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