

Employer Compliance in an Era of Heightened Immigration Enforcement: The IMAGE Program

March 16, 2017

PRACTICES Immigration, International, Labor and Employment

In February 2017, Secretary of Homeland Security John Kelly issued two memoranda providing guidance on the recent Executive Order entitled "Border Security and Immigration Enforcement Improvements." This Executive Order established new policies regarding effective border security and immigration enforcement. Although it emphasizes investigation and enforcement against undocumented persons, Kelly's memoranda also seem to reference employers:

As soon as practicable, the Directors of Immigration and Customs Enforcement ("ICE"), Customs and Border Protection ("CBP"), and the U.S. Citizenship & Immigration Service ("USCIS") shall issue guidance and promulgate regulations ... to ensure the assessment and collection of all fines and penalties ... authorized under the law ... from aliens and "from those who facilitate their unlawful presence in the United States."

Secretary Kelly does not elaborate about who such persons or entities may be. However, employers should be on alert, particularly since the Executive Order also calls for ICE to hire 10,000 more agents and officers, as well as additional operational and mission support and legal staff necessary to support their activities. For those unfamiliar with ICE's mission, among its broad activities, the agency is charged with worksite immigration enforcement. ICE conducts investigations and can target employers, maintaining that an "effective worksite enforcement strategy must address both employers who knowingly hire illegal workers, as well as the workers themselves."

Employers should be aware that the Immigration Reform and Control Act of 1986 ("IRCA") requires companies to verify their employees' eligibility to work lawfully in the United States. IRCA also directs employers to avoid discrimination in violation of the Immigration and Nationality Act's anti-discrimination provision. Violations can result in civil and criminal fines.

Various strategies exist for employers to minimize risk. For example, employers may wish to regularly conduct internal I-9 audits or participate in E-Verify, a voluntary internet-based employment eligibility verification program. A lesser known program, The Mutual Agreement between Government and Employers (IMAGE), should also receive employer consideration.

IMAGE is a formal membership certification program, which is managed by ICE. It is intended to be collaborative rather than adversarial. Upon enrollment and program completion, employer-participants receive IMAGE certification, a distinction DHS believes will be an industry standard. The primary benefits of IMAGE are that ICE will agree to (i) provide information and training on proper hiring procedures; (ii) not conduct I-9 inspections for a two-year period; (iii) waive potential fines if substantive violations are discovered on fewer than 50 percent of the employer's I-9s; and (iv) mitigate fines if substantive errors are found on more than 50 percent of the employer's I-9s. ICE also states that IMAGE Certification results in "avoidance of lawsuits and other legal actions resulting from unauthorized employment."

The program's requirements include (i) enrollment in E-Verify; (ii) completion of an IMAGE Self-Assessment Questionnaire; (iii) establishment of a written hiring and employment verification policy; (iv) submission to an I-9 inspection; and (v) execution of an IMAGE partnership agreement with ICE. In an era of increased enforcement, the IMAGE program is something to be considered. It should allay concerns for an unexpected investigation, contribute to the strength of the company's compliance programs, and enhance the employer's corporate image, while protecting its reputation and brand.

If you have any questions, please contact the lawyer listed below: