

THE IMMIGRATION COMPLIANCE BOOK

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A NEW REMEDY IN ICE'S ARSENAL: DEBARMENT

By Michael Wildes, Esq.

Immigration and Customs Enforcement (ICE) was created by the Department of Homeland Security (DHS) in 2003, but in the past 3 years its activity has begun to show danger signs for employers who are not fully compliant with the law. Its stated goal, as a division of the DHS, is to “uphold public safety by identifying criminal activities and eliminating vulnerabilities that pose a threat to our nation’s borders.” The goal, derived from its ultimate purpose, is to purge the threat of terrorist attacks on American soil.⁸⁴⁷ Recently, this serious mandate has been carried out with a strong focus on confronting unsanctioned immigration and unauthorized employment of non-U.S. workers. Administrative and criminal arrests during 2006 and 2007 were upwards of 4,500, including both unauthorized workers and employers charged with unlawful hiring. In 2008, approximately 400 arrests were made at Agriprocessors meat packing plant in Postville, Iowa, and 600 arrests were made at Howard Industries, a high tech manufacturer of electrical and medical equipment in Laurel, Mississippi. Arrests of unauthorized workers and workplace raids continue apace as ICE agents arrested 28 employees during a raid at Yamato Engine Specialists in Bellingham, Washington, in February 2009.

As DHS’ largest investigative branch, ICE has focused its attention to ensure employers’ due diligence in preventing unauthorized immigrants from acquiring employment. ICE investigates companies flagged for hiring unauthorized workers by executing warrants, conducting raids, and arresting employees and employers alike.

A company may find itself on ICE’s radar screen for a variety of reasons including past grievances, disgruntled employees, or operating in an industry known to employ unauthorized workers. Many investigative raids have resulted in large fines and serious property forfeiture levied against corporations, with employers facing civil and/or criminal penalties including jail sentences, aside from a plethora of separate legal problems suffered by the employees.

With the recent increased activity of the *search and destroy* attitude of ICE, the Federal Acquisition Regulations relating to possible repercussions for hiring unauthorized workers have become truly relevant for the first time since their inception in 1995. Federal Acquisition Regulations (FAR § 9.406-2(b)(2)) provide that companies may be considered for debarment—“the exclusion of a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period”—if there is evidence they:

⁸⁴⁷ <http://www.ice.gov/about/index.htm>

- knowingly hired unauthorized workers;
- continue to employ an alien who is or becomes unauthorized;
- engage in patterns and practices of knowingly hiring or continuing to knowingly employ unauthorized workers; or
- have been issued a final order for a civil fine which reflects unlawful hiring or continuing to hire unauthorized workers.⁸⁴⁸

But debarment is not the only threat in this instance. The simple consideration of debarment will gain a company entry onto a list of parties suspended, debarred, proposed for debarment, or otherwise excluded from financial and non-financial federal assistance and certain federal benefits. While the former Immigration and Naturalization Service was authorized to debar companies who hired unauthorized workers in 1996, this organization focused primarily on the use of civil fines to enforce employer compliance. ICE, on the other hand, files criminal charges, thus making debarment more effective. Any company found on the online registry, the Excluded Parties List System (EPLS)⁸⁴⁹, is immediately ineligible for all government contracts and sub-contracts. Essentially, they are now “blacklisted” out of all work in the public sector. In September 2008, 7 companies were notified of their entry onto the EPLS and their potential debarment. These companies were found to have knowingly hired or continued to employ unauthorized workers more than 2 years ago. They include:

- Bynum Brothers Home Improvement Co. - Buffalo, New York;
- CMC Concrete Construction, Inc. - Manassas, Virginia;
- Hedges Landscape Specialists Inc. d/b/a Exterior Designs, Inc. and d/b/a Performance Irrigation, LLC - Crestwood, Kentucky;
- Lochirco Fruit & Produce Inc. d/b/a Happy Apples - Union, Missouri;
- MC Cleaning - Bangor, Maine;
- Morgan Jones LLC d/b/a Jones Industrial Network and d/b/a Jones Networking - Baltimore, Maryland;
- Stonewall Concrete, Inc. - Manassas, Virginia.

The stories of these 7 companies’ experiences with ICE vary greatly. They show a frighteningly unpredictable pattern of the agency’s discovery of illegal activity. For example, CMC Concrete Construction, Inc. and its associate firm, Stonewall Concrete, Inc., were subcontracted to perform construction projects at government facilities including the Marine Corps Base in Quantico, Virginia, and an Army Base in Fort Meade, Maryland. After much surveillance, cooperation with local law enforcement, and review of state employment records, it became apparent to ICE that these companies were employing unauthorized workers. While executing a search warrant in March 2008, ICE arrested 34 unauthorized workers, seized numerous documents, and performed forensic analysis on the company’s computers. As a result, the owner of the company

⁸⁴⁸ http://www.ice.gov/pi/news/factsheets/ina_debarment.htm

⁸⁴⁹ <https://www.epls.gov>

pled guilty to unlawfully employing unauthorized workers, was sentenced to one year probation, and ordered to pay \$122,000 in forfeiture.

While ICE was conducting a drug investigation at Lochirco Fruit & Produce, Inc. d/b/a/ Happy Apples' plant, the agency became aware that 33 unauthorized workers were employed there. This company, whose orchards and facilities are located in Marthasville, Washington, and Union, Missouri, is in the business of selling fresh apples and making caramel apples and apple cider. As a result of the investigation, Happy Apples pled guilty to one misdemeanor count of hiring unauthorized workers, was fined \$599,000 including the forfeiture of 4 of its properties, and its owner was personally fined \$250,000, pled guilty to one felony count of hiring unauthorized workers, and was sentenced to probation.

Similarly, Dean Hedges, the owner of Hedges Landscape Specialists, Inc., Exterior Designs, Inc., and Performance Irrigation, LLC in Crestwood, Kentucky, was charged with engaging in a pattern or practice of knowingly hiring unauthorized workers. This charge stemmed from information obtained through a former employee who informed ICE agents that Mr. Hedges commonly employed unauthorized workers whom he considered a subclass of employees, and selectively completed Form I-9s for legally authorized workers. In addition to agreeing to forfeit \$147,000 from corporate bank accounts, Hedges was sentenced to 5 years probation after pleading guilty to knowingly employing at least 12 unauthorized workers at his business.

Now that it is known that ICE is aggressively pursuing employers who egregiously violate the law with respect to the knowing hire of unauthorized workers, employers must be prepared. In order to remain in good standing, avoid debarment, and remain off the EPLS, an employer should carefully set forth and implement strategies for immigration compliance with respect to its employees. This includes ensuring that all newly hired employees, citizen and non-citizen alike, have Form I-9 properly completed.

In the event of an investigation by ICE, the company will be required to present the I-9s for all active employees together with a current payroll and all I-9 supporting documentation. In some circumstances, the I-9s of terminated employees will be requested as well. ICE may look upon I-9 training and periodic in-house audits of the I-9s as a measure of the company's "good faith" attempt at compliance. While employers are not expected to be forensic experts, they are held to a "reasonable person" standard when viewing documents presented for I-9 verification purposes. Last, since the employer is unlikely to know when it may become the target of an investigation, it is prudent to proactively consult with immigration counsel so as to ensure effective compliance and, in the case of an enforcement event, avoid or minimize disruption in workplace productivity or the opportunity to vie for government contracts.

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renowned in the employer sanction arena and for his representation of employers who require assistance with their I-9 compliance audits and advice to assure compliance with government mandated information and recordkeeping requirements. Mr. Wildes is also the Mayor of Englewood, New Jersey—where he resides.