

Department of Homeland Security Raises Civil Fines for Employers Hiring Undocumented Workers

The Department of Homeland Security (DHS) recently announced a 25% increase in the civil fines that can be levied against employers who violate federal immigration laws. Under the new fine system, the maximum civil penalty for multiple violations went from \$11,000 to \$16,000. Additionally, some of the higher civil penalties for a first violation increased by \$1,000. This fee increase is part of the federal government's increased efforts to sanction employers and improve their program on worksite enforcement.

An Executive Order issued on June 9, 2008 instructs federal agencies to require contractor participation in the E-verify employment eligibility system as a term of future contracts. E-verify is an internet-based system operated by DHS in partnership with the Social Security Administration (SSA) which determines employment eligibility for new hires and the validity of their social security numbers. This is currently a proposed rule; thus, the program remains voluntary for employers. The final rule will not become effective until 30 days after publication.

Under the Immigration and Nationality Act (INA), any employer that violates employment eligibility requirements is subject to civil monetary penalties. Employers may be fined under the INA for knowingly employing unauthorized aliens or for other violations, including failure to comply with requirements relating to employment eligibility verification forms, wrongful discrimination against job applicants or employees on the basis of nationality or citizenship, and immigration-related document fraud. Civil fines are assessed on a one-violation-per-alien basis. For example, if an employer knowingly employed, or continued to employ, seven unauthorized aliens, that would result in seven separate fines. Employers contesting fines have the right to a hearing before an Immigration Judge.

Since its establishment in 2003, Immigration and Customs Enforcement (ICE) has dramatically enhanced its efforts to combat the unlawful employment of illegal aliens in this country. ICE's comprehensive strategy for worksite enforcement is aimed at promoting national security and public safety, and ensuring fair labor standards. In fiscal year 2007, ICE obtained more than \$31 million in criminal fines, restitutions and civil judgments as a result of worksite-related enforcement actions.

In our post-9/11 world, there have been increased efforts by DHS and ICE to detain people working illegally in the United States and to sanction their employers if those employers had actual or constructive knowledge of the employee's lack of employment authorization. An employer can minimize liability from an immigration enforcement perspective by following government-prescribed steps. It is not yet known how the regulations will impact employers' liability from the perspective of employees who feel they have been discriminated against.

DHS has provided guidance on the best hiring practices for an employer to follow to ensure that they are in compliance with the immigration laws:

- Use the Basic Pilot Employment Verification Program for all hiring.
- Establish an internal training program presented by immigration counsel, with annual updates, on how to manage completion of Form I-9 (Employee Eligibility Verification Form), how to detect fraudulent use of documents in the I-9 process, and how to use the Basic Pilot Employment Verification Program.

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- Permit the I-9 and Basic Pilot Program process to be conducted only by individuals who have received this training — and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process.
- Arrange for annual I-9 audits by an external auditing firm, immigration counsel or a trained employee not otherwise involved in the I-9 and electronic verification process.
- Establish a self-reporting procedure for reporting any violations or discovered deficiencies to ICE.
- Establish a protocol for responding to no-match letters received from the SSA.
- Establish a Tip Line for employees to report activity relating to the employment of unauthorized aliens, and a protocol for responding to employee tips.
- Establish and maintain safeguards against use of the verification process for unlawful discrimination.
- Establish a protocol for assessing the adherence to the “best practices” guidelines by the company's contractors/subcontractors.
- Submit an annual report to ICE to track results and assess the effect of participation in the IMAGE program (a voluntary program offered by ICE which provides education and training on proper hiring procedures, fraudulent document detection, use of the E-Verify employment eligibility verification program and anti-discrimination procedures).

Please contact your Hahn Loeser & Parks attorney if you have any questions.