



XpertHR Podcast

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Stepped-Up Immigration Enforcement Puts Employers on Notice

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David Weisenfeld: I’m David Weisenfeld for XpertHR.com, published by Reed Business Information and proudly partnered with LexisNexis.

On this podcast our attention turns to a topic you might have heard about a bit in the news – immigration enforcement. There was a lot of talk during last year’s election cycle about a certain wall being built, and while it remains to be seen if that will happen, stepped-up enforcement appears real. So what will be the practical implications of all this on employers, and how will it change the way they do business?

Fortunately, Ogletree Deakins immigration attorney, Christopher Thomas, is with us to provide some answers. Chris represents companies throughout the world, advising them on I-9 compliance issues and representing them in government audits and investigations. He manages the immigration practice in the firm’s Denver office, and heads up its Immigration Compliance group nationwide. Chris, welcome.

Christopher Thomas: Thank you.

David Weisenfeld: Chris, I’ll begin with this. What do you think stepped-up enforcement will mean practically for employers?

Christopher Thomas: Over the past few years we’ve seen an increase in enforcement coming from Immigration and Customs Enforcement and the Office of Special Counsel. By the way, the Office of Special Counsel has now changed their name. They go by the name of Immigrant and Employee Rights. And both have expanded their enforcement activity a great deal.

The trend with Immigration and Customs Enforcement, which goes by the acronym of ICE, in particular is moving toward criminal enforcement actions. They like the deterrent effect, the big splash of those criminal enforcement actions. So employers need to ensure that they’re walking the fine line between falling short – not getting their I-9s done properly, engaging in proper compliance-related

activities to meet the demands of Immigration and Customs Enforcement – and also going too far, running into trouble with Immigrant and Employee Rights. So it's an important time for employers to be preparing.

David Weisenfeld: With that said, I know this is always a constant concern, but do you think we will see more Form I-9 audits taking place?

Christopher Thomas: Yes, absolutely. Following the executive orders that came out from President Trump relating to interior enforcement, ICE is in the process of hiring 10,000 new agents. We're already beginning to see the effects of an emboldened federal agency with a significant uptick in I-9 civil audits and raids, though thus far those raids have been targeting immigrant communities and possible gang members, along with a substantial increase in all segments of undocumented individuals of the population.

Arrests relating to deportations are now up as high as 38% over this time a year ago, so clearly there's an uptick in enforcement activity. But the concern – and to answer your question directly – is that we anticipate that there will be a marked increase in I-9 audits and also the large-scale raids that we saw during the Bush administration, we expect will be returning soon. Based on some of the recent conversations I've had with ICE officials, it seems very clear that those days of the raids are coming back.

David Weisenfeld: What's the biggest question, Chris, that you're getting from clients in this area?

Christopher Thomas: Well the question we get is, "What can I do to prepare?" And the answer, of course, is to think in terms of demonstrating good faith. It reminds me of a situation I had a couple of years ago. There was a company out of Orange County that came to us and they said, "We've got problems. We're missing half of our I-9s, the other half are atrocious. What do we do?"

And so we worked with them to try to clean everything up. And it took several months but by the end we had done the very best we could, demonstrated the best good faith we could.

And believe it or not, a month after completing that audit, two ICE officials showed up at the front door and had a notice of inspection to commence an I-9 audit. I remember calling one of those ICE agents that evening and saying, "Look, you're going to find a lot of skeletons in our closet. We've got some problems but we've done everything we could to clean it up." And in that case, all said and done, that employer walked away with a warning notice, meaning no fines were imposed at all. Why? Because they had cleaned things up in advance of ICE showing up on the scene.

If you wait until ICE shows up, you're a little too late in the game and they're going to treat you very differently than if you've tried to clean things up in advance.

David Weisenfeld: What about the whole sanctuary city issue? That's gotten quite a bit of publicity. How does that factor in, and how has that affected these investigations if at all?

Christopher Thomas: We've see that there's been an uptick in enforcement activity in some of those sanctuary cities – Austin, Texas, Boston, a couple of others, San Francisco – have complained that they've seen an increase in enforcement activity with regard to arrests, community raids in immigrant communities, those kinds of things are going on. So certainly sanctuary cities seem to be in the crosshairs of this battle over what to do about illegal immigrants or undocumented workers in this country.

David Weisenfeld: Again, we're speaking with Ogletree Deakins immigration attorney, Christopher Thomas, of the firm's Denver office. Chris, do employers also need to ensure that their contractors and even subcontractors are complying as well?

Christopher Thomas: Well that's one of the complicated questions of the day. Under the regulations there is no such requirement. That I-9 compliance requirement falls upon the contractors to ensure that their employees are in the country legally. But the analysis is not always that easy. You may know about a certain retailer a few years back, for example, who was contracting with night cleaning crews, and ICE infiltrated the workforce of those cleaning crews and started having conversations while they were working with them with certain of this retailer's employees.

And when you're in a situation where you're on notice that people are in the country unlawfully, it doesn't really matter whether you're employing them directly or using them through independent contract labor – you're still on notice, and you start to have real legal issues.

What made it even more complicated in that situation was that this retailer also was allowing these contractors to use its tools, setting their schedules, taking all of the necessary steps to create what would probably be a joint employment relationship.

All said and done, that retailer ended up settling the case for \$11million, so this stuff can get pretty expensive.

And the question becomes, "Well what can we do to address a situation like that?" The answer lies, at least in part, in how you contract with these independent contract laborers. For example, you should obtain assurances of compliance with applicable law within the contract. You should have adequate indemnity clauses.

And then the third and only slightly more controversial one is that you should reserve the right to designate appropriate third parties, such as a lawyer of your choosing, to review the I-9s of on-site contractor employees in the event that you become aware of certain problems, such as complaints about identity theft, rumors in the workplace that maybe some of these guys are not documented. You want to retain the right to investigate those situations further, and if necessary to demand that those people are removed from the worksite.

David Weisenfeld: Chris, do you find that there are fewer workers from abroad seeking to work in the US since the new administration has taken over?

Christopher Thomas: Goodness. We feel pretty busy these days. But the numbers do reflect that there are at least some reductions going on. For example,

during the H1B filing season that we just went through, the numbers were down in the first week of April over last year. 199,000 petitions were filed as compared to 236,000 in the previous year.

We're also seeing some concern about the NAFTA-related visas, the TN visas for Mexican and Canadian nationals. The Trump administration's recently made their plans pretty clear that they intend to renegotiate NAFTA, and that could affect the TNVs to category two, which is at least leading to some cooling effect.

I'll add that the whole feeling in the world of immigration at this point is leading to a sense of greater scrutiny, and it's pretty clear that the administration's goals will be to complicate both illegal, but also legal, immigration in the coming months.

We're seeing that in the form of recent guidance memos that the US Citizenship and Immigration Services which leads us to believe that it's probably going to be a little bit of a tougher road to follow these days.

David Weisenfeld: And I know employers are always concerned with H1B visas and getting talented foreign workers here without issue. How much of a concern is that these days?

Christopher Thomas: It's a big concern. The H1Bs were gobbled up in the first week of April. They held a lottery to determine who the lucky grand total of 85,000 would be to have their cases adjudicated, and the remaining 115,000 or so who had applied had their petitions returned without being adjudicated. So it continues to be an ongoing battle trying to secure H1Bs for first-time applicants.

Now I should add that anybody who already has an H1B and has been counted against that numerical cap in the past would be eligible to get an H1B still. So somebody's in Company A and you're in Company B and you want to transfer them over, those people are still fair game and can be transferred from one company to another.

David Weisenfeld: And Chris, following up on that, what about visa issues in terms of re-verification?

Christopher Thomas: That's also a hot issue of the day, and one that's been evolving quite a bit this year. So you're hitting all the hot issues here.

It's an area that's leading to wild confusion. For example, some companies think that they should re-verify lawful permanent residents when their permanent resident cards expire by demanding that they produce additional documentation to do a Section Three update. That is not the case. In fact, when employers engage in such activity they're committing what's called "document abuse," and they're doing what I said at the outset – they're going too far and running into potential problems with Immigrant and Employee Rights. So we want to be careful not to re-verify people who are lawful permanent residents.

In addition, we've seen some changes from a regulation that went into effect on January 17th of this year, left by the Obama administration as a parting gift, which allows people who file timely

employment authorization cards to get an automatic 180 days of employment authorization. That's not for everybody. There's a certain category that appears on each employment authorization card.

If, for example you filed under C33, that would mean that you were somebody who had deferred action for childhood arrivals or DACA and that person would not be eligible for that 180-day extension period, whereas if you had somebody with, say, C9, somebody with a pending application for adjustment to status, that person would be eligible for the 180-day extension. So it's sort of a case-by-case analysis, unfortunately. It's become pretty complicated.

David Weisenfeld: One practical question, Chris. Are you seeing any special challenges or hearing about anything in terms of the new form now that it's a smart form?

Christopher Thomas: Well overall the form appears to be an improvement over prior versions. The smart features I think help employers select the right issuing authorities and helps in other ways.

But the problem we're seeing is that there is some confusion out there. This document does not qualify as an electronic I-9, as outlined in the regulations. In other words, the new smart form still needs to be printed. It needs to be signed by the employee in Section One, and it needs to be signed by the employer in Section Two after reviewing the employee's acceptable documentation. So don't be fooled. It's still a regular I-9 that needs to be printed and have the original signatures on it.

David Weisenfeld: We only have about a minute or so left, but do you have a final piece of advice for employers about what most to watch out for out there?

Christopher Thomas: Absolutely. The whole focus right now of this new administration with a new Attorney General, Jeff Sessions, who has focused his career on holding employers accountable, both with regard to legal and illegal immigration, is going to be compliance-related. And so that would be the parting gift – be careful, ensure that your I-9s are in proper order when you're pursuing lawful immigration through non-immigrant visa petitions, green cards et cetera.

You've got to be sure that everything you're doing is right. Ensure that you're checking the right boxes, that you're keeping it honest, never omitting key pieces of information. It's a world where we're going to see a lot of big splashes, I think, with a lot of criminal investigations for those who do not follow the rules the way they should.

David Weisenfeld: It's definitely a time to make sure that all of the i's are dotted and all of the t's are crossed.

Christopher Thomas: That's right.

David Weisenfeld: Christopher Thomas practices with Ogletree Deakins and manages the firm's immigration practice in its Denver office, and also heads up the Immigration Compliance group for the firm nationwide. Chris, thank so much for your insights.

Christopher Thomas: Thanks so much for your time.

David Weisenfeld:

I'm David Weisenfeld. We hope you've enjoyed this podcast. Continue checking our website regularly for more podcasts on key employment-related issues, including what marijuana legalization laws mean for employer drug testing.

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