

DHS to Focus on Prosecuting Employers Who Hire Illegal Workers

On April 30, 2009, the Department of Homeland Security (DHS) announced a shift in its workforce enforcement priorities from the prosecution of illegal aliens working in the United States to the prosecution of employers who knowingly hire them. According to a [fact sheet](#) distributed by DHS, only 135 of 6,000 arrests related to worksite enforcement in 2008 were employers. As a result, DHS issued new guidelines to Immigration and Customs Enforcement (ICE) with instructions to immediately "focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration."

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Employers - defined in this context as hiring managers, management, owners, CEOs, supervisors, and other occupational titles - can expect ICE offices to use their full authority when executing investigations such as the use of confidential sources, cooperating witnesses, and undercover agents. At critical infrastructure and national security sites, employee interviews may also be conducted. In addition to these direct investigative methods, employers who are suspected to be in violation of immigration laws may receive a Notice of Inspection (NOI), which ultimately results in an administrative audit of I-9 forms.

Civil fines will be administered when sufficient evidence is not available to support a criminal prosecution case. DHS reports that, in the mid 1990's, "employers received notices of intent to fine (NIFs) totaling \$26 million." Also, federal contractors in violation of immigration laws face possible debarment, eliminating the company's opportunity to secure work on federal contracts. DHS hopes that inserting new language into federal contracts requiring contractors and subcontractors to use the [E-Verify](#) system to verify the employment eligibility of those working on projects issued on or after June 30, 2009, will help to limit the number of fraudulent workers working on federally awarded projects.

Unlike before, when the arrests of illegal employees was a sign that a particular company might be under investigation, ICE has been given a directive to follow through on the prosecution of targeted employers prior to arresting employees at a given worksite and employers need to be prepared. Employers should be proactive in reviewing their employment practices to ensure compliance with immigration laws. Best practices include conducting regular internal audits of I-9 records, training hiring managers on the proper way to review and record verification documents on the [new version of Form I-9](#) (which all employers are now required to use), and establishing or reinforcing a policy addressing how managers and supervisors should respond if they become aware of facts indicating that workers are unauthorized.

Although general contractors are typically not liable for the immigration violations of their subcontractors under current federal law unless the contractor had knowledge of the violation or acted with reckless disregard, AGC advises contractors to consider adopting clauses in contracts with subcontractors and staffing companies by which the latter (a) certifies that it is in compliance with immigration laws and will maintain compliance, (b) agrees to conduct annual self-audits of its I-9 records, and (c) agrees to indemnify the contractor if it is found liable for employing an unauthorized worker provided by a subcontractor. In cases of particular concern and where appropriate, the contractor may also want to contractually require the subcontractor or staffing company to enroll in E-Verify. AGC further recommends that employers consult with an employment immigration attorney licensed in the project state to help craft appropriate contract language, train staff, and provide other counsel as needed.

Q&A information sheets on the new [Form I-9](#) for all employers and on [E-Verify](#) for federal contractors and subcontractors can be found on the [U.S. Citizenship and Immigration Services \(USCIS\) Web site](#) and the [AGC Web site](#).