

## How Prepared Are You for Trump 2.0's Worksite Enforcement Regime?

By Richard S. Hartunian, Jacqueline C. Wolff and Kaela M. Athay

### What You Need to Know

- Worksite enforcement encompasses efforts undertaken by the Department of Homeland Security through ICE and Homeland Security Investigations to enforce provisions of the immigration laws that prohibit the employment of unauthorized workers.
- Employers who hire workers in the technology, hospitality, construction, agriculture, healthcare, and maintenance industries should be especially prepared for heightened government scrutiny.
- Sensible steps include creating a compliance program with trained personnel who understand the business' hiring practices, conduct periodic internal I-9 audits, and are trained to respond to an unannounced ICE enforcement action.

Prior to the election, Tom Homan, a previous Immigration and Customs Enforcement (ICE) official under both President Obama and President Trump and the President's new border czar, vowed that President Trump would "restart workplace enforcement." See, "What to know about Tom Homan, the former ICE head returning as Trump's 'border czar,'" NPR (Nov. 11, 2024); ICE.gov. As the first months of the new administration have demonstrated, President Trump fully intends to deliver on that campaign



Photo: Ron Rogers/U.S. Immigration and Customs Enforcement via Wikimedia Commons

promise. Employers should prepare now to confirm their employees are authorized to work and have robust compliance policies and procedures in place should ICE come knocking.

### What Is Worksite Enforcement?

Worksite enforcement encompasses efforts undertaken by the U.S. Department of Homeland Security (DHS) through ICE and Homeland Security Investigations (HSI) to enforce provisions of the immigration laws that prohibit the employment of unauthorized workers. See, "Immigration-Related Worksite Enforcement: Performance Measures," Congress.gov (06/23/15). These prohibitions, set forth in

---

Section 274A of the Immigration and Nationality Act (INA), make it unlawful for an employer to:

- Knowingly hire, recruit, or refer for a fee for employment an unauthorized worker;
- Hire someone without complying with the employment verification process described in the INA; and
- Knowingly continue to employ someone who is unauthorized to work.

8 U.S.C. §1324a(a)(1)-(2).

Worksite enforcement efforts also include criminal enforcement for violations such as engaging in “a pattern or practice” of hiring, recruiting or referring unauthorized aliens for employment (8 U.S.C. §1324a(f)(1)), harboring (which prohibits, among other things, “any person” from concealing, harboring, or shielding from detection someone in “knowing or [] reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law,” 8 U.S.C. §1324(a)(1)(A)(iii)); or substandard wage or working conditions. See, “Worksite Enforcement investigations soar in FY18,” ICE.gov. Frequently the government will use the “catchall” false statement statute (18 U.S.C. §1001) to prosecute false statements made in documents submitted to federal agencies.

Worksite enforcement may also lead to the arrest, detention, and deportation of employees who are suspected of violating immigration laws, including by lacking proper work authorization.

### **What Can You Expect Now?**

We may glean some idea of what the future holds by looking at Trump’s prior term. In 2017, Homan pledged to quadruple the number of

workplace crackdowns, a promise he fulfilled. See, “ICE chief pledges quadrupling or more of workplace crackdowns,” CNN (Oct. 17, 2017). DHS’s Annual Performance Reports show during fiscal year 2019, HSI initiated 6,921 enforcement-related actions against employers for violations of immigration-related employment laws. This number represents the promised four-fold increase over the 1,730 enforcement-related actions undertaken in FY 2017 (which spanned the end of Obama’s second term and the beginning of Trump’s first). *Compare*, FY 2019 report with FY 2017.

More recently, one of the dozens of Executive Orders that the President signed within the first few weeks of his second term included one titled “Protecting the American People Against Invasion,” which, among other things, seeks to “ensur[e] that employment authorization is provided in a manner consistent with section 274A of the INA” “and that employment authorization is not provided to any unauthorized alien in the U.S.”

Further, many of the current administration’s early actions appear aligned with Project 2025. See, “Trump said he hadn’t read Project 2025 – but most of his early executive actions overlap with its proposals,” CNN (Jan. 31, 2025). Aside from broad-sweeping proposals such as completely dismantling DHS by combining or realigning its various units, more specific recommendations include permanently authorizing E-Verify and making it mandatory, including for anyone doing business with the federal government, and ensuring ICE operationalizes civil search warrants commonly used for worksite enforcement to streamline its investigations.

---

## DOJ Actions

Criminal enforcement appears to be another priority. One day after the inauguration, Acting Deputy Attorney General Emil Bove issued a memo instructing prosecutors to charge and pursue the most serious, readily-provable offenses. The memo specifically called out pursuing charges relating to criminal immigration-related violations, citing to the anti-harboring provision of the INA as an example, which carries with it criminal penalties of fines or imprisonment of up to 10 years if the violation is done “for the purposes of commercial advantage or private financial gain.”

Attorney General Pam Bondi, after taking office in early February, issued a memo instructing prosecutors that a decision to vary from this “core principle” “must be approved by a United States Attorney or Assistant Attorney General” with the reasons “documented in the file,” and that declinations of immigration-related offenses “shall be disclosed as Urgent Reports.” The takeaway from these directives is that Trump’s DOJ will not shy away from exacting the harshest punishments for employers who violate the harboring and other criminal immigration statutes.

### What Does Worksite Enforcement Look Like?

During President Trump’s first term, HSI described its enforcement strategy as including: 1) outreach (through the ICE Mutual Agreement between Government and Employers, or IMAGE program, “to instill a culture of compliance and accountability”); 2) compliance (through I-9 audits, civil fines, and referrals for debarment); and 3) enforcement (through the criminal arrest of employers and

administrative arrest of unauthorized workers). See, “Worksite Enforcement investigations soar in FY18,” ICE.gov.

### Against Employees

ICE agents have the authority to arrest employees when they have a valid warrant, or when they have reason to believe someone in their presence is violating U.S. laws or regulations (8 U.S.C. §1357(a)(2)), including working without proper authorization. Running away from ICE agents can create probable cause. See, “Factsheet: Trump’s Rescission of Protected Areas Policies Undermines Safety for All,” NILC (Feb. 26, 2025).

These arrests often result in workers being put in immigration detention and deportation proceedings. ICE may also execute criminal arrest warrants for immigration-related crimes and other criminal activity, including against employers. See, ICE.gov.

### Against Employers

Typically, an ICE investigation begins by serving a Notice of Inspection (NOI) on an employer, compelling the production of I-9 forms and other supporting documentation within 3 business days. See, *Split Rail Fence Co., Inc. v. United States*, 852 F.3d 1228, 1233 (10th Cir. 2017), citing ICE Form I-9 Inspection. In the event technical or procedural failures are found after review, the employer is given time to make corrections (at least 10 business days). Substantive violations and/or uncorrected technical or procedural failures may result in a monetary fine imposed on the employer. The employer may then request a hearing before an Administrative Law Judge (“ALJ”), and ICE may choose to open settlement negotiations. See, Form I-9 Inspection.

---

If no settlement agreement is reached, the hearing goes forward and the ALJ will issue orders stating findings of fact and law. The ALJ's decision may be appealed to the Chief Administrative Hearing Officer and, ultimately, the adversely affected party may petition a circuit court for review. See, *Split Rail Fence Co.*, 852 F.3d at 1233, citing 28 C.F.R. §68.56.

While technical violations of INA Section 274A may include behavior such as using an expired I-9 form, "substantive" violations can include failure to complete an I-9 form; failure to timely comply with verification requirements; failure to include an employee's alien registration number on an I-9 form; missing an employee attestation of immigration status; failure to sign the employee's name or employer's authorized representative's name, particularly when the identity of that person cannot otherwise be determined from the documentation; and technical violations that are not corrected after an opportunity to do so. See, *Buffalo Transportation, Inc. v. United States*, 844 F.3d 381 (2d Cir. 2016); *U.S. v. Majestic Petroleum Services LLC*, 21 OCAHO 1641, 2025 WL 515426 (Jan. 23, 2025). A "good faith" defense is available to employers for technical or procedural violations, but not for substantive ones. *DLS Precision Fab LLC v. U.S. Immigr. & Customs Enf't*, 867 F.3d 1079 (9th Cir. 2017) (noting that the employer had "already conceded its violations were substantive," and therefore the good faith defense was not available).

If a monetary penalty is assessed, the ALJ will determine the amount using the five factors set forth in 8 U.S.C. §1324a(e)(5): (i) the size of the employer's business; (ii) the employer's good faith; (iii) the seriousness of

the violation; (iv) whether or not the individual on the I-9 form was an unauthorized immigrant; and (v) a history of previous violations. 8 U.S.C. §1324a(e)(5); see also, *U.S. v. El Paso Paper Box, Inc.*, 17 OCAHO 1451B, 2023 WL 372469 (Jan. 12, 2023).

The INA also imposes criminal penalties on employers who "engage[] in a pattern or practice of violations" of certain INA provisions. 8 U.S.C. §1324a(f)(1). A "pattern or practice" does not need to be an elaborate scheme nor does it require hiring large numbers of unauthorized workers. For example, in a 2020 case before the Seventh Circuit, the court affirmed the conviction of a corporation for visa fraud and harboring and employing unauthorized workers, which included a charge of "a practice and pattern of hiring" three people. *U.S. v. Grayson Enterprises, Inc.*, 950 F.3d 386, 394, 2020 WL 701714 (7th Cir. 2020). In another case before the District of Connecticut, the court held that the indictment against owners of a restaurant chain had sufficiently alleged a "pattern or practice" of hiring unauthorized workers when it included facts such as placing newspaper advertisements and attending meetings in the country where the unauthorized workers lived, financing transcontinental airline passages, and hiring people knowing they were unauthorized to work. *U.S. v. Calhelha*, 456 F. Supp. 2d 350, 363-4 (D. Conn. 2006).

Engaging in a pattern or practice is not the only crime with which employers may be charged in connection with hiring unauthorized workers. Statutes such as the anti-harboring provision of the INA also carry criminal penalties. Under this provision, "specific intent is not an element of" harboring, and the government only needs to prove that a defendant's



conduct made an unauthorized worker's "illegal presence in the United States substantially easier or less difficult." *United States v. Martinez-Medina*, No. 08-30150, 2009 WL 117611, \*1 (5th Cir. Jan. 16, 2009). This may include actions such as providing "jobs, transportation, housing, and utilities" to such workers; paying unauthorized workers in cash; or failing to pay taxes on the workers' wages or complete I-9 forms. *Id.*

### Now Is the Time Get Your Company Ready

Under Trump 2.0's worksite enforcement regime, the time is now for businesses to prepare for enhanced enforcement efforts. Employers who hire workers in the technology, hospitality, construction, agriculture, health-care, and maintenance industries should be especially prepared for heightened government scrutiny. Sensible steps include creating a compliance program with trained personnel who understand the business' hiring practices, conduct periodic internal I-9 audits, and are trained to respond to an unannounced ICE enforcement action. These key personnel should know how to distinguish an administrative investigation from a criminal enforcement measure — like the execution of a search warrant — and who to call, what to say, and what to produce in each circumstance. The compliance plan should identify company leaders and a key legal contact, available at all times, who can spearhead efforts to communicate with the government, properly retain and produce non-privileged company records, and assist the business in getting timely advice from an immigration specialist to deal with complex work authorization issues.

Most importantly, the plan should ensure continuity of operations in the event an ICE operation disrupts ongoing business operations.

Worksite enforcement can happen at any time. Will your business be ready for it?

\*\*\*\*\*



**Richard S. Hartunian** is a partner at Barclay Damon LLP, focusing on white-collar defense, internal investigations, regulatory litigation, health care compliance and related government affairs. He is the former United States Attorney for the Northern District of New York. He can be reached at [rhartunian@barclaydamon.com](mailto:rhartunian@barclaydamon.com).

**Jacqueline C. Wolff**, a former federal prosecutor, is a senior counsel in the Investigations and White Collar Defense practice at Manatt, Phelps & Phillips, LLP, and is a member of the Board of Editors of *Business Crimes Bulletin*. She can be reached at [jwolff@manatt.com](mailto:jwolff@manatt.com).

**Kaela M. Athay** is a litigation association in the Trial, White Collar and Investigations practice group at Manatt, Phelps & Phillips, LLP and can be reached at [KAthay@manatt.com](mailto:KAthay@manatt.com).

***This article appeared in Business Crimes Bulletin, a Law Journal Newsletters publication that features the news and analysis you need to stay on top of the fast-changing, multi-faceted world of financial and white-collar crime.***

**BARCLAY DAMON** LLP