

Nervous Employers Re-Examine Practices in Wake of Immigration Raids

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Federal immigration officials recently arrested 55 undocumented workers in a raid in Tallahassee. The workers from Mexico, Honduras and Guatemala, were employed by General Building Maintenance, which had a contract to clean state government buildings. They face deportation. Federal officials declined to say how U.S. Immigration and Customs Enforcement (ICE) found out about the illegal immigrants, or whether any company executives would face criminal charges.

Some South Florida labor and employment lawyers warn that such federal raids signal that companies here must take serious steps to ensure that they are not employing undocumented workers -- either directly or through subcontractors. That could have a major impact on Florida's economy, which quietly has depended on illegal workers.

Many employers in the state's large agricultural, tourism and construction industries are nervous. And so are immigrant workers.

Congress has hit an impasse in its debate over whether and how to crack down on illegal immigration. But ICE and its parent agency, the U.S. Department of Homeland Security, have decided not to wait for new legislation. Relying on existing law, ICE has engaged in high-profile raids of worksites employing undocumented workers.

ICE also has proposed a plan to take action against employers based on their failure to respond to letters notifying them that their employees' Social Security numbers don't match information in government data bases.

Homeland Security Secretary Michael Chertoff has asked Congress for greater leeway in accessing and using evidence against employers. Under current law, ICE does not have access to information possessed by the Social Security Administration. Chertoff wants to allow data sharing so immigration agents can use nonmatching Social Security information as a lead to find illegals -- not just as evidence once illegals are found.

Unlike in the past, ICE isn't just seeking to assess civil monetary fines against companies found to have employed illegal aliens. It's also seeking criminal sanctions against executives for failing to follow a 1986 federal law making it illegal to hire undocumented workers.

These moves have caused many South Florida employers to change business practices, experts say. Employment lawyers say they're working closely with employers to set up more rigorous vetting of employees to ensure that there are no illegals on the payroll.

Attorney Sarah Tobocman, the Miami-based immigration practice chair for Gunster Yoakley & Stewart, said that in the past, the worst penalty an employer could expect for hiring an illegal immigrant was a civil monetary fine. Many companies built such fines into the cost of doing business. But the prospect of criminal charges against executives will cause companies to take serious precautions, she said.

Some Florida employer groups, particularly agricultural growers and builders, are looking to expand their reliance on immigrant workers brought into the United States on guest worker visas. They would like Congress to increase the number of such visas and ease the federal requirements on wages and benefits.

With the tougher enforcement by ICE, employers increasingly find themselves facing a Catch-22 situation. That's because while ICE is enforcing immigration laws, the U.S. Equal Employment Opportunity Commission is enforcing anti-discrimination laws. Employers cannot discriminate in hiring based on the possibility that an applicant is an illegal alien.

Legal experts say the situation is dicey. In Florida, tourism, agriculture and construction -- three of the biggest industries -- all use lots of immigrant labor. Some employers in these industries long have employed workers without looking too carefully at their legal status. It's estimated that hundreds of thousands of illegal immigrants are working in this state, including for large companies.

TEPID PUBLIC SUPPORT

On the other hand, there's tepid public support in this state, particularly in South Florida, for a federal crackdown. Even many Florida Republican leaders favor a moderate approach, including a path toward legal residency for illegal immigrants currently living in the United States.

A recent Zogby International poll for the *Miami Herald* found that 65 percent of South Florida Republicans surveyed favor establishing a path to legalization for immigrants currently living illegally in the United States. The survey found that 77 percent of South Florida Democrats supported that approach.

Despite Floridians' relatively lenient views on immigration, some lawyers warn that South Florida employers soon may have to give up using undocumented workers.

Keil Hackley, the former deputy chief counsel of the Immigration and Naturalization Service and now a Weston-based immigration attorney with Hackley Serrone, said it's just a matter of time before Florida employers are targeted for stricter enforcement. ICE and DHS "are putting their warnings out there," Hackley said. "They are absolutely going after employers who are profiting from illegal aliens."

Others, however, dispute that the Bush administration's current efforts are sincere or will last for long. Gregory Schell, a Lake Worth employment attorney with the farmworker rights group Florida Legal Services, argued that the recent raids and enforcement actions are driven by the White House's election-year efforts to appease conservative, anti-immigration Republican voters. He said all will be forgotten after Nov. 8 -- election day.

Indeed, federal officials so far have gone easy in South Florida, considering the large population of illegal immigrants here. The state's citrus groves and tomato fields would be a rich harvest for ICE agents if the agency chose to conduct raids there.

Schell estimated that more than 95 percent of workers on citrus groves in Florida are undocumented. Ray Gilmer, of the Florida Fruit and Vegetable Association, a growers' trade group, said the industry did not have any estimates on the number of illegal workers employed by the industry.

So far there have been no reported raids on the growers. "It would be an easy target," said Anis Nouhad Saleh of Saleh & Associates in Miami, who serves as president of the South Florida chapter of the American Immigration Lawyers Association.

Barbara Gonzalez, a Miami-based ICE spokeswoman, said she could not discuss how companies are chosen for raids because that's "law enforcement-sensitive information."

LEGISLATION STALLED

Based on the most recent U.S. Census numbers, the Washington, D.C.-based Pew Hispanic Center estimates that there are more than 11 million illegal immigrants living in the United States. With between 800,000 and 950,000 illegal immigrants estimated to live in Florida, the state ranks third behind California and Texas in the number of illegals.

These immigrants fill jobs in citrus groves and tomato fields, on construction and roofing sites, in the hospitality and restaurant industries, and in janitorial and landscaping services.

Since Congress passed the Immigration Reform and Control Act in 1986, it has been illegal for employers to hire undocumented workers. The act prescribes civil and criminal penalties for employers convicted of knowingly hiring unauthorized workers. Those with a pattern and practice of violating the law are subject to criminal sanctions.

The 1986 law made the I-9 form a key enforcement document. Employers must fill out the I-9 and verify an employee's employment status within three days of the person starting work.

For most of the past 20 years, however, these rules have not been rigorously enforced. The Immigration and Naturalization Service -- the predecessor of ICE -- sometimes would slap civil fines on noncompliant employers. But for the most part, the rules were dead letters. "Years ago, things could slide," Saleh said.

Then, over the past year, President Bush and conservative Republican leaders spearheaded a national debate over how to address illegal immigration.

Last December, the Republican-controlled House of Representatives passed a hard-line immigration bill that would make it a felony to be in the country illegally, substantially increase border patrols, order the construction of a fence along the U.S.-Mexico border, and boost civil and criminal penalties against employers for violations.

The House bill would require employers to shoulder more of the enforcement burden. The bill would set up a telephone- or electronic media-based employment verification system. That system would allow employers to verify the immigration status of new hires within three days.

In contrast, in May, the GOP-controlled Senate passed its own immigration bill. That bill, which has President Bush's support, would set up an amnesty program for undocumented immigrants already living in the United States and establish a path to legal residency. Like the House bill, the Senate measure also would require employers to take greater steps to ensure their workers are legal.

Even though there's broad agreement that something needs to be done about illegal immigration, the House and Senate have been unable to reach a compromise.

NO-MATCH LETTERS

In the absence of legislation, the Department of Homeland Security and ICE have charged ahead with their own enforcement policies.

Over the past six months, ICE has conducted raids on industrial pallet producer IFCO Systems North America and Midwest Airport Services, among others.

The raid on IFCO followed a yearlong probe that found more than half of the company's employees in 2005 had Social Security numbers that did not match identifying information in the Social Security Administration data base. The raid apprehended 1,187 illegal alien employees at 40 worksites around the country.

Seven current and former IFCO managers have been charged in Albany, N.Y., with harboring illegal aliens for financial gain. In addition, two managers at Midwest Airport have been sentenced to nine and 15 months in federal prison and fined a total of \$750,000.

Under current agency rules, ICE cannot use no-match letters from the Social Security Administration to go after employers for hiring undocumented workers.

A no-match letter informs an employer that an employee's recorded Social Security number, which the employee submitted on an I-9 form, does not match the name listed for that number in the Social Security Administration database.

But in June, ICE proposed a new rule that would put employers on constructive notice from the time they received a no-match letter.

Homeland Security estimates that as many as 10 percent of the 250 million W-2s the Social Security Administration receives each year belong to workers whose names do not match their Social Security numbers.

Experts caution that there are many causes for no-matches, including typographical errors and name changes. But no-matches also result from illegal immigrants falsely using other people's Social Security numbers or providing bogus federal work permits to employers.

The proposed rules would allow ICE officials to use no-match letters as proof that employers "knowingly" employed illegal immigrants. It would require the employer to take certain actions within a set period of time.

The proposal also would close the subcontractor loophole. Currently, employers can hide behind subcontractors who hire undocumented workers for their projects. Employers could claim that they did not know that their subcontractors were employing illegal labor. Without proof of actual knowledge on the part of the employer, the government couldn't charge the employer with a crime.

Under the proposed rule, once an employer receives a no-match letter for employees -- even if they are hired through a subcontractor -- ICE would consider the employer on notice that it employed an illegal immigrant.

Lani Kahn Drody, president of the Builders Association of South Florida and Lowell Homes, said her organization considers it unreasonable to expect employers to check the legal status of all their subcontractors' employees.

Ray Gilmer, of the Florida Fruit & Vegetable Association, said it's not unusual for Florida growers to receive no-match letters. Farmers cannot turn away potential employees who submit legitimate looking

documents. Gilmer said his industry's initial reaction to the new no-match safe-harbor proposal was not all positive.

It will "require a lot of the [employer's] time to hold the hand of the employees in question," he said. "But if they have to do it, they have to do it."

WORKER INSECURITY

Bruce Nissen, director of research at the Center for Labor Research and Statistics at Florida International University, said the national immigration debate has created a strong feeling of insecurity among immigrant workers.

Gilmer said even the rumor of an immigration raid will cause immigrant workers, both legal and illegal, to scatter and not go to work. This leads to major worker shortages for growers.

Homeland Security officials said they did not know when the agency would issue a final regulation.

"One thing [ICE and the DHS] could do is sit on it until after the Nov. 7 election and then rule," he said. "Then [they can] water it down or come down hard. But people's ballots have already been cast."

In the past, employers often were advised by their attorneys not to worry about receiving a no-match letter, because there are many reasons a no-match can occur.

But now, South Florida employment attorneys say local employers are taking no-match letters more seriously.

Hackley said she advises employers that receive no-match letters to determine the true immigration status of the employee while at the same time not jumping to any conclusion.

When the no-match letters first started going out in 2002, she said, thousands of workers resigned or were fired because employers were unsure of their employees' immigration status. If ICE steps up enforcement based on no-match letters, she cautioned, that problem could be major in South Florida because of its large population of immigrant workers.

"This use of the no-match letter is premature and a potentially dangerous enforcement tool," Hackley said. The Social Security Administration database is "notoriously error-prone and will undoubtedly result in wrongful terminations."

In addition, some employment lawyers complain that the 63-day time frame proposed in the new ICE regulation for resolving discrepancies in Social Security information is unreasonable. Tobocman said that would leave employers little choice but to fire the worker.

Tobocman said she is working with clients to set up internal training programs for the proper completion of employment verification forms and for detecting fraudulent green cards, work permits and Social Security cards.

"Now more than ever, it's essential that employers have written policies in place" for when they receive a no-match letter, she said. She advises her clients that they also should have policies in place for employee compliance and what to do in case of a government audit or document request.

LOOKING FOR ALTERNATIVES

Drody, of the Builders Association of South Florida, contended that most builders and developers don't know how many illegal workers they employ. She said builders and developers need to make sure they work with reputable subcontractors to reduce the number of illegal workers.

Edie Ousley, a spokeswoman for the Florida Home Builders Association in Tallahassee, said many employers don't know how to detect fraudulent documents.

Both of their groups favor an expanded guest worker program that would allow skilled workers who already are in the United States illegally to continue working in the construction industry.

Undocumented workers "want to pay their taxes and be a part of the system instead of hiding in the crevices," Drody said.

In the agricultural industry, Fritz Roka, a University of Florida agricultural economist, said stepped-up enforcement against illegal workers and employers that hire them may push growers to further explore mechanized farming techniques.

Roka said there also is increasing interest among growers in guest worker programs.

Through the federal H-2A guest worker visa program, Los Angeles-based agricultural staffing company Global Horizons provides farm workers for growers.

Gregory Schell said he has heard that growers in the South Florida area have used the company to bring in workers under the H-2A program.

Merle Dautrey, a spokesman for Global Horizons, estimated that between 2 percent and 4 percent of farmworkers nationwide are in the United States on H-2A visas. As immigration enforcement tightens, that percentage is likely to increase, he said.

The United Farm Workers union has supported the guest worker visa program, said union spokesman Marc Grossman. The UFW has signed a contract with Global Horizons requiring that all guest workers brought in by the company will become members of the union.

But workers don't come cheap under guest workers' visa program. Under the H-2A visa, temporary guest workers can come into the country for a specified maximum period of time, and employers are obligated to provide housing and pay at least the Adverse Effect Wage Rate for the state. For 2006, the AEWR in Florida was \$8.56 an hour. There is no cap on the number of workers who come in under the H-2A program.

Gilmer said the agricultural industry is working to modify the H-2A program to make it a more attractive choice for farmers and growers by allowing growers to provide housing vouchers instead of actual housing for workers. Growers also seek to speed up the approval process for bringing in guest workers.

Grossman said that if farmers cannot find legal workers at affordable wages, farming will move overseas.

'MASSIVE IMPACT'

Employment and immigration experts are split on whether the Bush administration's recent moves signal that employers need to seriously change how they do business.

That uncertainty arises because the country is split on how to handle the immigration issue.

Miami pollster Sergio Bendixen of Bendixen & Associates wrote in March that "an overwhelming majority of legal immigrants think that the undocumented 'take jobs that legal residents and citizens do not want to do.' These legal immigrants also feel that the undocumented have a positive impact on the quality of life of Americans and 'help the economy by providing low-cost labor.' "

FIU's Nissen said that if federal officials were serious about cracking down on South Florida employers and their illegal workers, "it would have a massive and very serious impact." But he predicted that the administration will engage in "a selective, showy, sporadic set of arrests to create fear, but not to the point of harming farming or industry."

Sarah Tobocman disagrees. It's no secret that South Florida businesses have a high percentage of undocumented workers, she said. Businesses should expect to see greater federal enforcement of immigration laws. "Employers need to be prepared for a change," she warned.