

Immigration: What's an employer to do?

People want to work: Help them out or turn them in?

By Francesca Jarosz

In a hot late-July morning, in the middle of a bustling Chicago street, about 25 Hispanic men and women prayed with their eyes wide open.

In front of them, microphones and TV cameras captured their petitions as pedestrians passed by, some slowing and glancing over to see what was going on. Behind them, the city's Immigration Court hovered, reminding those gathered why they prayed.

Three months before, 26 illegal workers were arrested at a suburban plant of IFCO Systems North America packing company — a fraction of about 1,200 workers caught in a nationwide company raid. On this day, 11 of the 26 Chicago-area workers faced trial to determine whether they would be deported.

"Stop the raids — what you see here is only the beginning," said Emma Lozano, president of the immigrant rights group Centro Sin Fronteras (Center without Borders), addressing the small gathering of press and other onlookers in a speech after the prayer. "What we're looking for is a miracle."

Lozano and her compatriots aren't the only ones concerned about what could be a major shift in immigration policy. With workplace enforcement prominent on the reform agenda, corporate lawyers and their business clients will be among those affected by the outcome of a continuing political debate about what to do with the nation's 12 million illegal immigrants.

Raids like the one on IFCO target mainly flagrant violators who knowingly hire illegal workers. But other proposed policies, such as the mandatory system of verifying work authorization by employees' Social Security numbers that was proposed in both Senate and House bills, could bring companies big fines and jeopardize the stability of their workforce. Today, these issues have legal minds at even the most conscientious companies thinking about what could ensue from the changes. And in an area of law where complying without violating civil rights has always been a walk on a balance beam, employers now are stepping more carefully.

Eight years ago, Robert Divine, an immigration lawyer who is now chief counsel for U.S. Citizenship and Immigration Services (USCIS), wrote an article telling business lawyers how to abide by the rules of hiring foreign-born workers. Now, he said the issue has taken on a new significance.

"In this atmosphere of concern about not wanting to be the next enforcement target," Divine said, "There's a concern with being as responsible as possible."

In years past, businesses haven't had reason to be so concerned.

The practice of illegal hiring was first banned under the Immigration Reform and Control Act of 1986. From its inception, the enforcement system seemed intended to fail, said Mark Krikorian, executive director of the Center for Immigration Studies, a Washington-based think tank that pushes for tighter immigration control.

When workers are hired, they're required to fill out I-9 forms and pre-sent documents for evidence of their identity and authorization to work. In screening employees, companies rely on human resources workers to keep a vigilant eye for fake documents and forged identity, the holes through which illegal employees can enter a company. But some say those discrepancies can be difficult to detect.

"Businesses really are between a rock and a hard place," Krikorian said.

Numbers prove the system's inefficiencies. About 7.2 million unauthorized immigrants were employed as of March 2005, which makes up about 4.9 percent of the civilian labor force, according to the Pew Hispanic Center. In the agriculture industry, the biggest employer of illegal workers, an estimated 75 percent of the workforce is illegal, said Monte Lake, chief counsel for the National Agriculture Coalition and counsel for the National Council for Agriculture Employers.

Past efforts to crack down on illegal hiring have met with little success. In 1999, the now-defunct U.S. Immigration and Naturalization Service went on a campaign to check employees' records at meatpacking plants in Nebraska, Iowa and South Dakota and then interview employees whose records raised red flags. Through the effort, known as Operation Vanguard, officials found almost 5,000 of about 24,000 workers at the plants had questionable documents, and 70 percent of them fled rather than go through the interviews. As some plants shut down, the operation, which was slotted to expand over the next few months, died because of lobbying pressure from meatpackers and ranchers.

Enforcement efforts such as Operation Vanguard were scaled back 95 percent between 1999 and 2003 by the INS. Prosecutions for illegal hiring plummeted from 182 employers in 1999 to four in 2003, according to government statistics.

Even an unintentional enforcement project soured in 2002. The Social Security Administration sent out about a million letters to employers to clear up misspellings, name changes and other mistakes that caused discrepancies between SSA records and employers' W-2 records. When it was discovered that the mismatches were caused by illegal workers fudging their information, droves of illegal employees quit or were fired. Businesses and immigrant-rights organizations responded with a successful joint effort to reduce the number of letters the SSA sent out by 90 percent.

In recent months, though, government officials have taken a turn toward implementing the laws. So far this year, the worksite enforcement arm of Immigration and Customs Enforcement (ICE), which was created in 2003 to implement immigration laws, has made 445 criminal arrests, the majority of which have been of employers, ICE spokesman Dean Boyd said. That's a jump from last year, when the agency made 176 criminal arrests, and a quantum leap from 2002, when INS made 25.

Penalties for illegal hiring have gone from the INS measure of fines to the new ICE tactic: handing out criminal charges and seizing assets.

Among this year's examples is the owner of a Boston cleaning business, who pleaded guilty to charges that include knowingly hiring illegal workers and now faces up to 15 years in prison and a \$250,000 fine. In another case, operators of a well-known Baltimore sushi chain faced a forfeiture of \$1 million after they pleaded guilty to money laundering and carrying out an illegal hiring scheme, according to ICE's Web site.

Boyd said the tough tactics aren't just a flash in the pan. ICE has requested money to expand its workplace enforcement task force by about 200 in fiscal year 2007. "This is something you'll see a lot more of in the future," Boyd said.

Thus far, ICE has mainly focused on targeting blatant violators and those that use cheap, illegal labor as an exploitative business model. But that doesn't exempt even the companies that say they're well-intentioned from the policy changes that could accompany the government's new hard-hitting tactics in enforcing illegal hiring.

Both the House bill that passed in December 2005 and the Senate bill that passed in May 2006 contain provisions for verifying the status of workers. The proposed Employment Eligibility Verification System (EEVS) would be modeled after Basic Pilot, a voluntary government-sponsored program launched in November 1997. About 10,000 of 7 million employers currently use Basic Pilot, which allows employers to verify new hires' work authorization by submitting their names and Social Security numbers to the Social Security Administration database. If the numbers and names match those in the system, the employer is informed that the new hire is confirmed to work.

If employees' names and numbers don't match those in the SSA database, DHS officials check it. After that, if the information still doesn't match, workers have 10 days to provide further evidence of authorization before they're deemed unconfirmed and employers fire them.

The House proposal would mandate that after a new verification system is enacted, all new employees be verified within two years and that all previously hired employees be verified within six years. Employers targeted for illegal hires through the system could face fines of up to \$40,000 per immigrant. Under the Senate bill, the system would be phased in after 18 months and after \$400 million has been appropriated to implement it. Unlike the House bill, previous hires would not have to be verified. Fines would be up to \$20,000 per immigrant under this bill, and employers with patterns of illegal hiring could also face three years' prison time.

Regardless of how the bills are reconciled, businesses and their counsel anticipate legislation that requires all employers to use an EEVS system, and that has some of them concerned.

Angelo Amador, director of immigration policy for the U.S. Chamber of Commerce, which represents 3 million businesses, said employment verification systems aren't accurate enough to implement on a wide scale. In his address to a U.S. House of Representatives subcommittee on the issue, he cited error rates of other government agency databases, such as the Internal Revenue Service, which is between 10 and 20 percent.

Human error, such as an incorrect data entry because of a compound last name, could result in an eligible employee not being confirmed by the system. Amador compared it to a traveler being falsely targeted on a terrorist database and forbidden from flying. "It's a heck of a lot more complicated because we're talking about employment," Amador said.

Divine said in his two years at USCIS, it's appeared the major hold-ups with Basic Pilot have been few. He said there hasn't been a single lawsuit against the government due to a glitch in the system. Divine added that his agency is improving its databases by using better data sources. They also plan to produce temporary work cards through a centralized system, instead of producing them locally, which often brings up errors in the system.

"We're trying to cut down on the need for human intervention," Divine said.

But attempts to reform verification systems highlight other fears. For instance, to combat the problem of inaccuracy, the Senate bill proposes that after two months, companies can't fire tentative nonconfirmations — employees whom DHS has yet to deem authorized or unauthorized. This principle would pertain until the verification system is 99 percent accurate.

Amador said this presents a conflict for businesses employing large numbers of tentative nonconfirmations. If these workers are later found to be illegal, it could appear as though businesses hired them with knowledge that they're illegal. "We're looking for finality as opposed to this individual walking around with a question mark over his employment eligibility," Amador said.

Another issue for businesses is the careful balance of enforcing without discriminating. Swift & Co., a \$10 billion-a-year meatpacking operation that has used Basic Pilot since 1999 to streamline its hiring process, experienced the struggle firsthand in 2002. The company settled, with no admission of guilt, for \$200,000 after the Office of Special Counsel cited Swift employees at a Minnesota plant for enforcing what OSC deemed a more rigorous verification procedure for new employees who looked or sounded foreign.

In the case of EEVS, companies would be sent "no-match" letters when their employees' Social Security numbers don't match numbers in the system. The letters direct employers to notify workers that they have 60 days to clear up the mismatch before they're fired. Failure to abide by the no-match system can be viewed as evidence against employers of intentional illegal hiring.

But on the discrimination end, Lake said in some cases employers also have been prosecuted for placing too heavy a burden on employees to prove their identity after a no-match letter has been issued.

"It's a damned if you do, damned if you don't law with no bright line," Lake said. "You're getting very mixed messages from different agencies."

The Senate bill also proposes that fines companies pay go to a new Employer Compliance Fund, instead of to the general Treasury. Amador said because the fund supports agencies that target businesses for illegal hiring, the proposal encourages zealous prosecution of businesses.

"The fund provides an artificial incentive for fining and overly aggressive policies," Amador said.

Another issue is how the verification system will affect the immigrant workforce. Under the Senate bill, a new program called the H-2C visa would allow 200,000 illegal immigrants who have been in the United States for anywhere from two to five years to stay in the country under a temporary worker program for three years, with the possibility of a three-year extension. A similar amnesty plan exists for agricultural workers, and both programs contain guidelines to regulate wage and labor standards for the workers and the chance to obtain citizenship. The House bill, however, contains no such provisions.

Lake said firing workers can have chilling effects on the agriculture industry, which depends heavily on immigrant labor. Domestic workers typically don't want agriculture jobs, he said, and the picking of certain perishable crops can't be mechanized.

Lake said this year his clients have reported more ICE visits, which typically include requests to see all the company's I-9 forms or those of a particular worker. "The question becomes, who is going to produce our food and who is going to replace them?" Lake said. "There's a real anxiety."

Provisions like the Senate's H2-C help to alleviate the anxiety, though. Many who represent business interests are banking on comprehensive reform that includes provisions for an expanded guest-worker program and protects the industries' need for workers. Lake said he foresees Congress' final legislation being comprehensive — as it was in 1986.

"The public emotions are more heated in a post-9/11 environment, but the policy outcome will be similar," Lake said. "We know our government will not deport these people."

But increased employment verification could affect the legal immigrant workforce, as well. Don Wiseman, general counsel for Swift & Co., said eliminating illegal workers creates fear and distrust of the government among the immigrant community at large, which makes attracting new workers more difficult.

"Not all employers do the same things, but we all face the same risks," Wiseman said. "Slamming the breaks on is great. But if you slam them on too hard, it has a serious disruptive effect."

Not everyone is sympathetic to businesses' complaints.

Ana Avenda-o, associate general counsel and director of the immigrant worker program for the AFL-CIO, said the guest-worker provision in the Senate bill shows that politicians are looking out for "corporate concerns." Avenda-o said guest workers are a means of cheap labor for businesses because they fill permanent jobs with temporary workers who have little bargaining power. "Multinational corporations are pushing for this model of easy, inexpensive access to workers with no rights," Avenda-o said. "Employers are getting exactly what they want from this. Any sort of violation against the company is just the cost of doing business."

Krikorian said businesses should embrace verification systems as a means of eliminating what he said is an unnecessary reliance on illegal labor. If illegal workers were deported, Krikorian said, the effects would be similar to those in the early '70s, when agriculture became more mechanized following the end of a temporary worker contract program called the Bracero.

"Verifying who workers are amounts to smart business practice," Krikorian said. "A lot of these businesses are building their workforces on sand instead of concrete."

Businesses also contend that they want to eliminate illegal hiring. They support a mechanism that allows them to hire legally, but they want it carried out in a way that clearly distinguishes guidelines, such as when enforcement can be discriminatory. They also want to ensure that the crackdown doesn't interfere with business itself.

Some companies, such as Swift, advocate a safe-harbor program, through which businesses in

compliance with government verification systems can't be prosecuted for illegal hiring. Others are simply doing all they can to be prepared for a mandatory verification system if, or — as many predict — when it goes into place.

Take Wal-Mart, for instance. In March 2005, the company settled for \$11 million after ICE deemed it lax in its enforcement of legal hiring among 12 of its cleaning-company contractors, which also paid the government \$4 million in criminal forfeiture. At the time, both payments signified the government's most significant enforcement actions against hiring illegal immigrants since the practice was banned.

Michael Spivey, Wal-Mart's vice president of immigration compliance, said because the company has about 50,000 contractors and many of their employees perform services late in the evenings, the workers are more difficult to monitor.

Wal-Mart says it has already learned from its mistakes. Magdeline Momani, Wal-Mart's in-house lawyer, said now the company educates its hiring personnel on basic immigration laws and regulations. It audits contractors at random and has drafted new contracts that state its concerns about complying with immigration laws. The company also set up a hotline that employers and customers can call to report if they have suspicion that the company hired an illegal worker.

"In our mind's eye, we've ensured sufficient resources," Momani said. "We've come out the other side setting a standard for the industry. The message we want to get out is, 'We've heard the message.'"

Even with these precautions, what will remain an issue for employers if EEVS systems go into effect is that illegal workers can still assume the identity of someone who is legal and slip through the hiring process. Wiseman said companies should train hiring personnel to look carefully at documents, while remaining fair and nondiscriminatory in their questioning of new hires.

"We don't have much discretion left when it comes to any subject," Wiseman said. "We have a lot of laxness on one hand and a lot of stringency on the other."

The subjects of the government's stringency who were praying outside Chicago's Immigration Court that July morning filtered into the court to await trial. Some wiped away tears and embraced each other. Lozano once again spoke out for their concerns, first in English, then in Spanish, the only language spoken by some of the workers and their families.

"They are not criminals. We have the support of the state," Lozano said, in reference to some local officials' lobbying on the workers' behalf and other state politicians' support of legalization.

The judge did grant the 11 workers a one-year stay of deportation, giving them the chance to remain in the country if Congress approves a bill granting legal status to many of the country's illegal immigrants. The decision provides some validation for businesses and corporate counsel convinced that comprehensive reform is to come.

Until it comes, though, employers — like those outside the Immigration Court — might be praying, and keeping their eyes wide open.

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