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Commentary

Nice Guys Finish Last

Julie Myers Wood, 08.24.09, 3:52 PM ET

Imagine two companies: first, a construction company that has received repeated notices for several years from the Social Security Administration of hundreds of irregularities in the social security numbers used for employment purposes at the company. These same social security numbers were used as a basis for work eligibility on I-9s. This company chooses to ignore the no-match letters and as a result, continues to employ significant numbers of unauthorized workers.

Second: another construction company that goes above and beyond the norm and signs up for the voluntary E-Verify program to further ensure that it is hiring only legally authorized workers. Although the company undergoes immigration compliance training, they inadvertently make some mistakes in the E-Verify implementation process. When they discover the mistakes, they immediately correct them.

In tough economic times, the Department of Homeland Security (DHS) should focus on ensuring a level playing field for honest businesses, and regulating unscrupulous firms who use illegal workers to cut costs and gain a competitive advantage. Clearly, the federal government should focus its enforcement efforts on the first company and not the second. It would be consistent with general beliefs of fairness and justice.

Unfortunately, if last week's federal register announcement of "dropping the no-match rule" is any indication, the DHS is squarely aiming its efforts on employers who are trying to do the right thing. By ignoring a critical tool that can help agents target employers and instead augmenting the monitoring and compliance of E-Verify users, as announced in May, the administration has turned our sense of fairness and justice upside down.

Of course, DHS' intent to formally revoke the no-match rule is not a big surprise. Earlier this summer, the administration slipped this announcement in with its very positive announcement that it is mandating E-Verify for federal contractors. But while DHS claims that they are dropping the no-match rule as part of their push to do "smarter" worksite enforcement, the evidence suggests that they are also leaving some critical tools for targeting the most egregious employers back in the toolbox. Not only are they discarding the safe harbor rule, but DHS has declared that they will no longer be looking at no-match letters as part of enforcement actions. DHS said as much in Wednesday's announcement declaring, "DHS has determined that focusing on the management practices of employers would be more efficacious than focusing on a single element of evidence within the totality of the circumstances."

This is a mistake. ICE agents and federal prosecutors have routinely used no-match letters as part of an overall strategy to target egregious employers. How an employer handles no-match letters, or rather how they don't, can often provide significant insight into an employer's overall compliance strategy, and useful evidence to support a criminal indictment.

The government's case against a pallet company, IFCO Pallet Systems, shows how no-match letters fit into an overall case. The IFCO case began with a tip from an IFCO employee. According to court documents, this IFCO worker had witnessed a number of his co-workers ripping up their W-2 forms as soon as they were given them. When he asked a manager why, he was told that since those employees were illegal aliens, and didn't intend to file tax returns, the W-2s were meaningless.

According to an affidavit filed in this case, the Social Security Administration noted that in 2004 and in 2005, at least 13 written notifications were sent to IFCO headquarters in Houston. Despite being informed of thousands of mismatches, less than 1% of the forms were corrected.

The investigation centered on IFCO's management practices--including the treatment of no-match letters. The result? In January 2009, IFCO agreed to pay nearly $21 million in civil fines--the largest worksite fine ever. In addition, 16 officers and managers of this company, including two vice presidents, have been charged criminally. Nine have already pled guilty to charges related to the employment of illegal aliens. The remaining defendants are currently awaiting trial, and, are, of course, innocent until proven guilty. IFCO's actions caused real harm to law-abiding competitors in the pallet industry. As one competitor of IFCO noted shortly after the case was first announced, "now I know how they were able to constantly underbid us."

DHS' decision to disregard no-match letters and focus on E-Verify alone to drive compliance is nonsensical. Employers who are on E-Verify and participating in IMAGE generally do not receive no-match letters. With E-Verify participation, employers resolve most no-matches when a new employee starts working. Instead, employers who are not on E-Verify receive the majority of the no-match letters. And, E-Verify and IMAGE are generally voluntary programs (except for federal contractors and those mandated by state laws). DHS is essentially conceding that they are going to focus on the employers that need the least scrutiny, and ignore useful information that will help DHS target the next IFCO.

Where does this leave well-intentioned employers? Without guidance on no-match letters, and without assurance that voluntary participation in government programs such as E-Verify will give them any protection. To the contrary, DHS is increasing audits of E-Verify employers, and targeting those employers for potential enforcement action. And perhaps worst of all, well-intentioned employers heard loud and clear from the administration, "never mind what the egregious employers are up to, it's you who should be concerned." Where's the justice, or logic for that matter, in that?

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