

HOW IMMIGRATION LAWS IMPACT YOUR CONSTRUCTION CLIENTS

North Carolina Bar CLE Presentation, February 2010

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INTRODUCTION

The construction industry is in the forefront of worksite immigration enforcement efforts by various governmental agencies, including Federal agencies and in some cases by state and local governments. This article begins with a discussion of the new climate of enforcement in which construction lawyers need to understand how their clients operate. Part I reveals policies now advocated by ICE to criminally prosecute employers, managers and supervisors. Part I also explains how investigations are typically conducted, provides basic information regarding ICE Notices of Inspections, administrative subpoenas, civil and criminal warrants, penalties such as civil fines and penalties, debarment from Federal contracts, typical criminal actions and discusses the specter of imputed liability of subcontractors to prime contractors and owners. Part II addresses immigration compliance requirements in Federal and North Carolina construction contracts. Part III identifies immigration-related options for the construction industry. Part IV addresses best practices for immigration compliance for clients in the construction industry and critically looks at the “best practices” advocated by governmental agencies.

I. THE NEW CLIMATE OF ENFORCEMENT

A. Historical Reference (in a Nutshell)

Prior to 1986, it was not against the law for an employer to employ an individual who was not authorized to work. This changed in 1986 when the Immigration Reform and Control Act (IRCA) added a new Section 274A to the Immigration and Nationality Act (INA). Under this added section, it became unlawful for an employer to knowingly hire or continue to employ an alien who was not authorized to be employed. As a result, all employers were required to participate in an employment eligibility verification system in which they examined documents presented by new hires to verify identity and work eligibility and complete and retain I-9 verification forms.

Particularly after 2001, the I-9 verification system had been perceived to have been undermined both by document fraud (when employees presented counterfeit and/or invalid documents) and by identify fraud (when employees presented valid documents that had been issued to other individuals). The document examination requirement of §274A(b)(1)(A) merely provides that an employer is in compliance with respect to the documents examined by the employer “if the document reasonably appears on its face to be genuine.”

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amended IRCA, pertinently to clarify some of the more difficult employer compliance issues under the

original act. In order to help combat identity and document fraud concerns, IIRIRA directed the Attorney General to establish three pilot programs. Under the Basic Pilot Program (renamed E-Verify during the Bush administration) the only one of the three pilot programs still in operation, participating employers can verify the employment eligibility of new hires by accessing Social Security Administration and Department of Homeland Security databases. E-Verify is administered by the U.S. Citizenship and Immigration Services. E-Verify began in 1997 in five states and has since been expanded into all 50 states. In January of 2009, the USCIS reported that over 103,000 employers had registered with the E-Verify System.

Originally intended and promoted as a *voluntary* pilot program, IIRIRA §402(e) nonetheless provided that each department of the Federal government, each Member of Congress, each officer of Congress, and the head of every legislative branch agency “shall elect to participate in a pilot program.” In addition, under this same section, employer violators of the provisions of IRCA §274A on unlawful employment or those employers who engage in unfair immigration-related employment activities (as defined in IRCA §274B) may also be required to participate in a pilot program.

When comprehensive immigration reform failed to pass Congress in June 2007, mission creep of the pilot program occurred during the waning years of the Bush administration by requiring certain employers to use the E-Verify pilot program. First, in October, 2007 all Federal departments and agencies were required to verify their new hires starting on or after that date. Later in June 2008, executive order 13465 amended a prior Clinton-era executive order and mandated that all Federal contractors conduct electronic eligibility verification. The order read, in pertinent part:

Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.¹

The Secretary of the Department of Homeland Security designated E-Verify three days later as the required employment eligibility verification system for Federal contractors.

Stepping up enforcement efforts, in September, 2008, Immigration and Customs Enforcement (ICE) notified seven companies that they could be potentially debarred from Federal contracts for engaging in unlawful immigration-related employment practices.² Notably, of the seven companies notified, four companies were in construction-related industries. This notification was the first time that ICE chose to utilize the debarment enforcement rule in over 12 years. This did not come as a complete surprise to many immigration and employment attorneys. Since 2007, ICE had begun to target bad faith employers by using criminal charges, fines and

¹ Executive Order 13265, 73 *Federal Register* 33283-33287, June 11, 2008, amending Executive Order 12989.

² <http://www.ice.gov/pi/nr/0809/080912washington1.htm>

forfeitures, and public announcements that part of the DHS' new strategy was to "create a culture of compliance."³

ICE's compliance initiatives have since increased. According to ICE's latest Annual Report, in fiscal year 2008 ICE secured almost \$21 million in criminal fines, penalties and forfeitures from employers and made 1,103 criminal arrests and 5,184 administrative arrests, an increase of 27% over 2007.⁴

Today, even though President Obama's transition team had proclaimed that "[i]mmigration raids are ineffective: Despite a seven-fold increase in recent years, immigration raids only netted 3,600 arrests in 2006 and have placed all the burdens of a broken system onto immigrant families" and that the administrations plans were to "bring people out of the shadows" by "Support[ing] a system that allows undocumented immigrants who are in good standing to pay a fine, learn English, and go to the back of the line for the opportunity to become citizens,"⁵ Federal enforcement efforts against contractors and other employers have only increased.

B. ICE's Strategy is to Criminally Prosecute Employers

Starting in April 2006, ICE began a new strategy to target employers who used unauthorized workers. Previously when enforcement measures were taken by the previous Immigration and Naturalization Service (INS, which was absorbed into the Department of Homeland Security and has been subsequently divided into the U.S. Citizenship and Immigration Services (USCIS) and into ICE), the emphasis was on education and administrative compliance. Since ICE was formed, ICE has decidedly taken a much more aggressive approach, using all available criminal investigation techniques to pursue enforcement and punishment of violations of immigration-related employment laws.

On May 8, 2006, in Northern Kentucky, ICE raided Fisher Homes. By this raid, ICE delivered a new message to immigration and employment practitioners. Construction lawyers need to hear this message too: We are coming after your clients. Fisher Homes is a typical construction company developing residential homes and subdivisions. During the raid, ICE arrested 74 workers and four of the company's construction supervisors. The workers were charged with illegal entry and arraigned in the U.S. District Court for the Eastern District of Kentucky. But notably, the four Fisher Homes supervisors were charged with felony counts of conspiracy to harbor and harboring aliens. Later, two additional supervisors were indicted on the same counts.

The alarming factor for practitioners in the Fisher Homes case is that the unauthorized workers were not employees of Fisher Homes – *they were all employees of subcontractors*. Fisher

³ "The agency's aim, says ICE Assistant Secretary Julie Myers, is to show employers and workers that until new immigration laws come into effect, the agency will steadfastly enforce existing law. 'Our goal is to create a culture of compliance,' says Myers. 'The IRS doesn't audit every tax return in the country, but the threat of an IRS audit is enough to compel most people to do the right thing.'" http://www.businessweek.com/bwdaily/dnflash/content/aug2008/db20080819_105143.htm?campaign_id=rss_daily

⁴ http://www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf

⁵ www.change.gov; originally accessed November, 2008 (portions of the quotes referenced here from the website have subsequently been deleted when accessed December 29, 2009).

Homes of course asserted that the employees were the responsibility of the subcontractors and that Fisher Homes did not have any knowing use of illegal workers on their jobsites. Nonetheless, the supervisors were charged with felonies by knowingly using subcontractors to get around the I-9 requirements of IRCA and allowing illegal aliens to be employed at their jobsites.

Since then, ICE has been stepping up its enforcement efforts, and has acknowledged that its new strategy is to target the employers of undocumented workers. Recently in a press release regarding enforcement efforts against Columbia Farms located in Columbia, SC, Homeland Security Assistant Secretary for ICE John Morton remarked “We are committed to bringing employers into compliance with the law and will leverage all of our authorities to achieve that goal. Although voluntary compliance is our preferred outcome, ICE will use enforcement tools, civil and criminal, when appropriate to bring about compliance.”

According to ICE’s April 30, 2009 Worksite Enforcement Strategy internal memorandum (attached at Appendix A), the criminal prosecution of employers, *including owners, CEOs, supervisors, managers and anyone involved in the hiring or managing of employees*, is now a priority component of ICE’s worksite enforcement program. The rationale is that enforcement efforts against employers are a better way to target the root causes of the problem of illegal immigration and the prioritization of criminal prosecution of the actual employers furthers this goal because employers are not sufficiently punished or deterred by the arrest of their illegal workforce.

Arresting and removing illegal workers is still a part of the strategy to deter unlawful employment, but increasingly we should all expect to see our clients become the target of enforcement efforts.

The investigatory techniques used by ICE are similar to traditional law enforcement techniques, particularly techniques that have more commonly been seen with drug trafficking investigations. A company may be under surveillance for some time before an ICE officer knocks (politely, of course) at the front door. Additionally, the IRS can get involved by opening concurrent, related investigations of criminal tax evasion and non-withholding of employment taxes.

To first conduct an investigation, ICE must have a lead and articulable facts concerning employer violations. Articulable facts cannot be based solely on an employee’s race, ancestry or the way an employee simply “looks.” U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975). However, articulable facts may include factors such as race or alienage when coupled with other factors, such as the employer’s history of hiring undocumented workers and an ICE officer’s observation of persons entering or leaving the place of business. Matter of King & Yang, 16 I&N Dec. 502 (BIA 1978).

Articulable facts forming the basis of a reasonable suspicion are “measured against an objective reasonable man standard, not by the subjective impressions of a particular officer,” Nicacio v. INS, 797 F.2d 700 (9th Cir. 1985), and may be based on an anonymous tip. U.S. v. Widow Brown’s Inn, 3 OCAHO no. 399 (Jan. 15, 1992).

A legacy INS Employer Sanctions Field Manual identified articulable facts as including: An Officer's knowledge of high concentration of illegal aliens in the area; the industry or type of employment involved; an employee's excessive nervousness or studied nonchalance around ICE officials; and the employee's inability to speak English.

ICE uses wired informants also. How does ICE get someone to wear a wire against their employer? One approach is when an illegal alien is picked up at a traffic stop in a county that has signed a Memorandum of Understanding with ICE under the 287(g) program. Once the immigration status of the detained individual is ascertained to be unlawful, the individual is handed over to ICE. ICE questions the employee about his or her employer, how he or she became employed and is offered a deal: time to remain in the United States with special employment authorization in exchange for wearing a wire to work or when seeking employment for another employer.

Sometimes ICE makes the deal to a supervisory employee of the employer targeted in an investigation. In exchange for assisting ICE, the supervisor can plead out to a lesser charge and get a reduced sentencing recommendation under §5K1.1 of the United States Sentencing Commission Guidelines Manual. The supervisory employee may have been identified by an undercover agent posing as a prospective employee.

The following are other typical ICE leads:

- A disgruntled worker, HR manager or office manager feels or knows the company is not in compliance with employment verification laws and telephones or sends letters to ICE.
- A worker is terminated or laid off at the end of a project. When applying for unemployment he tells the ESC clerk that his former employer did not withhold Social Security and income tax payments because the employer paid in cash. This triggers an investigation by the Department of Revenue, which also informs the IRS. The U.S. Attorney notifies ICE.
- ICE conducts an I-9 inspection and finds that workers are using false documents, documents that belong to a deceased person, or documents that had been stolen. Instead of notifying the company of the discrepancies, ICE can use this information to obtain a search warrant and open a criminal investigation against the company.
- The company tries to "fix" the immigration problems of its workers and submits to the U. S. Department of Labor an application for labor certification, or files a petition with USCIS for an immigrant worker for an unauthorized employee. The U.S. DOL and the USCIS can share this information with ICE, which by the filing of the application or petition now considers the company to have at least constructive (if not actual) knowledge that the company is knowingly employing its worker without authorization.

Once a lead is obtained, in lieu of a Notice of Inspection of the company's I-9 records, ICE can then apply for an administrative search warrant, a civil search warrant or a criminal search warrant before a Federal magistrate or judge to search the worksite and the employer's offices for evidence of specific crimes regarding the employment of illegal workers.

C. Notice of Inspection, Subpoenas and (gulp) Warrants

i. Who can Issue a Notice of Inspection

In the perfect world under the Federal statutes and regulations, only ICE, the U.S. Department of Labor and the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) of the U.S. Department of Justice can legally demand to inspect a company's I-9 records. However, states have been passing legislation allowing various state agencies and units of local governments to inspect a company's internal I-9 forms. While North Carolina has yet to pass legislation, several bills have been introduced, some of which allow for state agency inspections, county attorney inspections, and even inspections by local law enforcement officers of a company's I-9 records. Luckily, Pandora's Box has not yet been opened in our fine State.

However, North Carolina practitioners with clients in South Carolina need to become familiar with South Carolina's state immigration laws which allow for state inspections of a company's I-9 forms, civil penalties and the revoking of a no-fee, no-application business "license" that all companies with employees are deemed to possess.

The South Carolina law requires public employers to use E-Verify for all new hires, while contractors have the option to use E-Verify or comply with certain license or identification rules described in the SC law. Contractors with 100 to 499 employees must have complied with the law starting July 1, 2009, and those with less than 100 employees must comply by July 1, 2010.

There are compelling preemption arguments against state-level workplace immigration laws. However, this poses one of the most complex preemption cases of which a law professor can dream, and is beyond the scope of this article.

In short, it is an unresolved issue as to who can issue and enforce the issuance of an NOI. Until the preemption argument is settled, the authority to issue NOIs may be asserted by various state agencies. Many companies acquiesce to these state requests and thereby possibly waive any potential preemption argument that can be had.

While states may claim authority to issue NOIs, NOIs can certainly be issued under Federal law by ICE, the U.S. Department of Labor and the Office of Special Counsel for Immigration-Related Unfair Employment Practices of the U.S. Department of Justice.

ii. The Notice of Inspection

All Federal agencies authorized to inspect a company's I-9 forms must provide at least three days notice to the employer prior to inspection. 8 C.F.R. §§274a.2(b)(2)(ii), 1274a.2(b)(2)(ii). If a state agency is demanding to inspect a company's I-9 records, some immigration professionals have successfully insisted that the state agency provide at least the notice required under the cited Federal regulations.

Inspection by ICE is now usually initiated by a Notice of Inspection (NOI) delivered in person or formally served by certified return receipt mail. A copy of a NOI is attached as Attachment B. Be aware that other, more creative attempts may be made by ICE or other agencies to get a look at a company's I-9 records in an attempt to get a waiver of the three day notice rule. For example, several years ago one client was approached by a young female who casually identified herself as an independent contractor of a Federal agency (we were never able to confirm which agency she was supposedly from) and asked the receptionist if she could take "a quick look at" the company's I-9 records so that she could check off a box on her form and fulfill a purported quota she had to make. Luckily the receptionist in that case thought quickly on her feet, informed the owner immediately who called counsel – which naturally demanded three days written notice. The young female left and never returned.

An inspection notice by the U.S. DOL is usually contained in the first letter to the employer informing the employer that a complaint has been filed against the company and casually lists the company's I-9 forms as a set of documents that the U.S. DOL intends to inspect. Typically if the U.S. DOL finds substantive errors in the company's I-9 records, it will refer the company to ICE for further investigation.

Failure to properly notify an employer may not implicate the due process clause because the NOI does not lead to the employer's final deprivation of property. Maka v. INS, 904 F.2d 1351, 1357 (9th Cir. 1990), amended 932 F.2d 1352 (9th Cir. 1991). The regulations provide that no subpoena or warrant is required for an inspection and that "any refusal or delay in presentation of the Form I-9 for inspection is a violation of the retention requirements as set forth in §274A(b)(3) of the Act." 8 CFR. §§274a.2(b)(2)(ii), 1274a.2(b)(2)(ii).

Some NOIs state that "ICE will require all I-9 forms and a list of current and past employees including dates of hire and termination, payroll records and W-2 reports." Others do not. Note that the regulations only provide that I-9s must be provided.

Included with the NOI will be a document entitled "Instructions on How to Prepare for an ICE Business Inspection." This document will instruct the company to provide not only the original I-9 forms, but also a copy of all supporting documentation such as copies of passports, drivers licenses, social security cards, birth certificates, permanent resident cards, etc., used in the I-9 process. The instructions also instruct the employer to alphabetize the I-9 forms and provide an additional copy of each I-9 form. In addition, the instructions say to:

Provide a copy of the most current payroll showing the full name of each employee and the amount of each employee's paycheck and withholding tax deducted.

Provide an alphabetized list of all employees hired after November 6, 2006, indicating the date of hire, termination dates, and date of birth for each employee. The instructions indicate that they will request that this list be certified by a company representative as being true, complete and correct to the best of the signing person's knowledge.

Complete a Business Entity Questionnaire and Employer Information Certification Form. This form seeks information such as all the names of owners and partners, addresses of

other business divisions and sites, name of parent company, who has authority to hire workers and who completes I-9 forms. Also, it queries how the employees are paid.

Provide a copy of the company's Form DE-6 (Quarterly Wage and Withholding Report) for the most recent fiscal year.

Here, you will need to use your best legal and business judgment, coupled with close consultation with the client, as to how much information the company will provide in the course of an inspection of the company's I-9s. Remember, the regulations provide for only the provision of the actual I-9 records. But, ICE can and does subpoena under authority granted by 8 CFR §287.4 to obtain evidence that is relevant to its inspection. Negotiation can usually be had to provide relevant data that is not too burdensome on your client.

At a minimum, be sure to provide the I-9 forms within the proscribed time to ensure that the company is in strict compliance with the regulations.

iii. Responding to a Notice of Inspection.

First, hopefully your client has called you immediately after receiving a NOI. After consulting your client, call the ICE officer that is listed on the NOI. Introduce yourself as counsel for the company and try to negotiate a more convenient date and time for the inspection to occur. Review carefully the scope of the NOI, the instructions and subpoena (if attached).

Generally, once your client receives a NOI, you may be able to obtain some additional time in which to respond by calling the contact identified on the NOI and requesting a reasonable amount of time to respond. An additional 5-10 days may be reasonable. Maybe not.

During the three days notice period, experienced counsel should be brought in to conduct a comprehensive I-9 audit to identify mistakes, errors and omissions and make corrections, if possible. This is not time for inexperienced counsel to learn the ropes.

Corrections should be documented clearly on the form and errors should be legibly crossed out. Ensure that no fraud occurs by backdating documents or falsifying documents. Facts are as they are; do not let your client reconstruct facts. In a rush you may have to triage: The most important corrections to make are (a) if there is no I-9 for an employee, one needs to be obtained; (2) make sure the employee attestation in Section 1 has been completed by the employee; (3) make sure the employee has signed the I-9 form; (4) all data has been completed in Section 2 or that at least a copy of the relevant documents are attached; and (5) the employer has signed the forms.

Note that other parts of the form, such as failure to date the I-9 (if the failure occurred after September 30, 1996), the failure to record the date of hire in Section 2 and failure to record documents in Section 2 if copies of the documents are attached are considered to be technical deficiencies and that under INA §274A(b)(6), ICE cannot fine an employer for technical or procedural deficiencies that occurred after September 30, 1996 unless it has provided a Notice of

Deficiency giving 10 days to cure the identified errors. A copy of the deficiencies that are considered technical or procedural is attached hereto at Appendix C.

The provision of the company's I-9s can occur at either the company's location or at ICE's office. If the documents are provided at the company's location, the ICE officials present are not otherwise authorized to view the premises or to interview employees without explicit consent.

If the inspection will occur at your client's premises, remember that the ICE representative is a law enforcement officer, and all the traditional rules about plain view, reasonable search and seizures and other Fourth and Fifth Amendment rules attach. It is always advisable to not allow the ICE representative to intrude on the workplace. Further, ICE may request or demand to tour the company's premises during the inspection in advance of executing a search warrant in order to note all entrances and exits and to determine how to best secure the premises if a follow-up "raid" ensues. Be mindful of all the Fourth and Fifth Amendment rights your clients have and prepare them in advance of the inspection.

iv. Subpoenas

If a person or entity does not comply with the request for I-9s, the officer may compel production by issuing a subpoena. 8 CFR §§274a.2(b)(2)(ii), 1274a.2(b)(2)(ii). In fact, often a subpoena is included with the NOI and instructions. A subpoena will list all of the documents included in the instructions and may also demand:

An independent contractor roster listing the dates of hire and termination;

1099s for all independent contractors;

A list of all paid on-call individuals employed on a sporadic, irregular or intermittent basis not otherwise deemed to be an employee;

Social Security "no-match" letters (Social Security Administration Employer Correction Requests);

Copies of all non-immigrant and immigrant visa petitions and labor certifications from the U.S. Department of Labor;

Copies of articles of incorporation, business licenses and annual reports;

Copy of the company's procedures and policies for I-9 preparation.

An administrative subpoena from ICE is not self-enforcing. In order to enforce the subpoena, ICE must seek enforcement in Federal court, which would be likely to enforce the subpoena or modify it after arguments from counsel. When representing your client in this situation, recognize that the burden imposed on ICE in seeking court enforcement of its subpoena can be weighed against the burden on your client to voluntarily comply by providing the demanded

information. You should be able to negotiate what is ultimately provided to ICE in a normal routine audit.

v. *Warrants, Criminal... and Civil?*

A search warrant in any flavor, however, is an entirely different animal from a NOI or a subpoena. ICE will have already made application to a Federal judge or magistrate for a warrant to search the worksite for the presence of workers without work authorization and for evidence that specific crimes have been committed.

If there is probable cause established that specific crimes have been committed, ICE and other relevant agencies may apply for a criminal search warrant.

Also, ICE is authorized by INA §§235(a) and 287(a), 8 U.S.C. §§1225(a) and 1357(a) and 28 U.S.C. §1651 to apply for a *civil* administrative search warrant authorizing ICE agents to enter and inspect private premises to locate, question *and apprehend* illegal aliens. These civil warrants, called Blackie's Warrants, may be issued by a Federal court upon a showing of a reasonable likelihood that the company's premises has illegal aliens present, and in contrast to a normal criminal warrant, a specific description of every suspected alien is not required. Int'l Molders & Allied Workers' Local Union No. 164 v. Nelson & INS, 799 F.2d 547 (9th Cir. 1986) ("We agree with the District of Columbia Circuit that 'warrants and accompanying affidavits narrow down the field of potentially vulnerable persons to those employees whom INS agents might reasonably believe to be aliens' satisfy the requirements of the Fourth Amendment even where the targeted persons are not identified by name." Id. at 553, quoting Blackie's House of Beef, Inc. v. Castillo & INS, 659 F.2d 1211, 1226 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982).

For probable cause issues connected with a civil administrative search warrant, a lesser showing of probable cause is required because the ICE workplace searches are conducted pursuant to the agency's civil administrative mandate. Blackie's, 659 F. 2d at 1222-1225. This lesser probable cause element of the warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]." Marshall v. Barlow's Inc., 436 U.S. 307, 320, 98 S.Ct. 1816 (1978).

The components of either type of warrant will be similar: The order from the court authorizing a search will specify that the search is to be completed within 10 days, before a specific date and probably during daylight hours. The warrant will include a description of items to be searched and seized. Typically the list will include all documents listed on the NOI, the instruction letter and the subpoena. Also, the warrant will seek to search any buildings (other than residential buildings) and vehicles on the premises for the presence of illegal workers, and any other evidence specific to the employment of illegal aliens.

Attached to this manuscript at Attachment D is a copy of a civil administrative search warrant application and affidavit from an ICE officer testifying to the specific facts leading to a warrant.

In this case, note that the warrant was executed after the NOI and subpoena was responded to by the company.

E. Civil Penalties, Debarments and What's This About Subcontractors?

i. *Paperwork violations.*

Civil penalties for failure to properly fill out and maintain I-9s range on a sliding scale from \$110 to \$1,100 for each I-9. The following factors determine the amount of the fine: The size of the employer's company, whether there was good faith present, the seriousness of the violation, whether the employee was in fact an unauthorized alien, and the company's prior history of violations.

ii. *Employing Unauthorized Aliens.*

If the offense occurred before 3/27/2008: \$275 - \$2,200 for the first offense, \$2,200 - \$5,500 for the second offense and \$3,300 - \$11,000 per alien for third or higher offense. If the offense occurred after 3/27/2008: \$375 - \$3,200 for first offense, \$3,200 - \$6,500 for second, and \$4,300 - \$16,000 for third or higher offense.

The above penalties add up very quickly, especially for companies that have a large workforce or rely heavily on subcontractors that may in some cases be imputed to the general contractor. (See discussion below).

iii. *Debarment.*

All government contractors that do business with an agency of the Executive Branch are subject to the Federal Acquisition Regulations (FAR) and may be debarred for violations of immigration laws. As defined in FAR 9.403, a contractor is "any individual or other legal entity that conducts any business, or is expected to conduct any business, with the Government as an agent or representative of another contractor." Debarment applies to almost all Federal government contract opportunities, including work for the Department of Transportation, the Department of Defense, and all other Federal government agencies. Debarment is a discretionary measure, but its use is expected to increase.

Debarment from Federal contracts also impacts eligibility for state and local contracts since many states will not award contracts to companies that have been debarred from Federal contracts. For example, most North Carolina Department of Transportation contracts contain in the bid proposal's Standard Special Provisions (usually on pages 19-20) a certification that is made by placing the bid that neither the prime contractor nor its subcontractors are "not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency." (See Appendix E).

FAR subpart 2.1 defines debarment as "excluding a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period." FAR 9.406-4 states that debarments for violations of immigration-related laws are for one year, but can be extended

for an additional period if the Secretary of DHS determines that the contractor is continuing to be in violation of immigration-related employment laws.

Pursuant to FAR 9.406-2(b)(2) and Executive Orders 12989 and 13286, there are at least four violations of the INA that may render a government contractor debarred:

1. Conviction of knowingly hiring unauthorized workers;
2. Conviction of continuing to employ an alien who is or becomes unauthorized;
3. Conviction of engaging in patterns and practices of knowingly hiring or continuing to employ unauthorized workers; or,
4. The issuance of a final order for a civil fine which reflects unlawful hiring or continuing to hire unauthorized workers.

In practice, whenever DHS determines through an ICE investigation that a contractor is not in compliance with immigration-related employment laws, the DHS informs the appropriate contracting agencies of this determination by entering the company's name into the Excluded Parties List System (EPLS). The EPLS is a web-based system that lists companies that have been debarred or proposed for debarment or otherwise excluded from receiving government contracts, subcontracts, and other Federal assistance and benefits.

Once on the list, the contractor will be immediately prohibited from bidding on new government contracts unless the agency head provides compelling reasons for allowing the company to compete for future contracts. Also, the debarred contractor cannot provide services to the government as a subcontractor through a non-debarred contractor.

As mentioned above, debarment is a discretionary measure, but it is certainly a tool in the ICE toolbox that can be used against contractors. Mitigating factors exist in FAR 9.406-1(a). These factors are the following:

1. Whether the contractor had an internal compliance program in place at the time of the violations, or adopted one prior to the government's debarment investigation;
2. Whether the contractor brought the violations to the government's attention in a timely manner;
3. The contractor's level of cooperation with the investigation and court or administrative actions;
4. Whether the contractor has paid or agreed to pay all criminal, civil and administrative liability for the violations;
5. Whether the contractor has implemented or agreed to implement remedial measures;
6. Whether the contractor has instituted or agreed to institute new or revised internal control procedures.

For some companies that rely heavily or exclusively on government contract work, the seriousness of the risk of debarment can be likened to a corporate death sentence. If your client's work involves such contracts, nothing should be more important to them than to perform internal audits and put in place a compliance program.

iv. *Liability for Subcontractors' immigration problems.*

No, the immigration nightmare may not end at your client's door. While the I-9 regulations do not require an employer to check employment authorization and identity documents or complete an I-9 for independent contractors, the workers in question must actually qualify as independent contractors in order for the purported employer to escape liability. The Fisher Homes case noted above is an example of enforcement efforts looking past the traditional employer-employee relationship to also encompass independent contractors and subcontractors.

Constructive or actual knowledge that a subcontractor is employing unauthorized workers subjects the upper-tier contractor to liability for violations. Under 8 CFR §274a.5, any person or entity knowingly using a subcontract to obtain the labor or services of an alien in the U.S. knowing that the alien is an unauthorized alien with respect to such labor or services, is considered as the employer for purposes of INA §274A(a)(1)(A) violations concerning the unlawful employment of unauthorized aliens. The regulations define constructive knowledge broadly in 8 CFR §274a.1(l)(1) as: “[t]he term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.” However, knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. This definition can make prime and upper-tier subcontractors ripe for enforcement efforts.

Also of concern is whether a subcontractor, as an independent contractor can be considered an employee for immigration purposes. A person is not generally considered an “employee” for purposes of employer sanctions if she is an independent contractor as defined under 8 CFR. §§274a.1(j), 1274a.1(j). U.S. v. ABC Roofing & Waterproofing, Inc., 1 OCAHO no. 247 (July 25, 1991), aff'd, 2 OCAHO no. 358 (Aug. 26, 1991). Factors considered in the determination of independent contractor status include whether the individual or entity supplies his/its own tools or materials, makes its services available to the general public, works for a number of clients at the same time, directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done. 8 CFR §274a.1(j). ICE reportedly also use IRS regulations as a guide.

Additional common law factors include: the relationship with the employer including the amount of supervision and the manner in which the work relationship is terminated; whether the rate of pay is by hour or by the number and quality of jobs; whether the job requires low level or high level skills (jobs requiring low level skill are rarely independent); employer/employee intent and local and industry practice; and provision of certain benefits like annual leave, retirement, or Social Security. U.S. v. Bakovic, 3 OCAHO no. 482 (Jan. 15, 1993).

In using this defense, counsel should also look to IRS Guidelines, Pub. No. 539, Restatement (Second) of Agency, §220(2) (1958), and North Carolina state law definitions. While an employer may request a determination as to whether a person is an independent contractor by submitting Form SS-8 to the IRS, however keep in mind that the IRS' determination on exemption does not prevent a separate and different determination for employer sanctions

purposes by ICE. Bakovic, Supra (IRS determination that maritime crews are generally independent contractors not binding).

The independent contractor defense is not available where a person or entity knowingly uses a contract or subcontract to obtain labor that is unauthorized to work. Merely designating in an independent contractor or subcontractor agreement that the person or entity is an independent contractor, or even a paragraph in a subcontract agreement requiring the subcontractor to not hire undocumented workers is not sufficient to escape from the liability imposed by the INA if constructive knowledge can be inferred under the broad regulatory definition of knowledge above.

Another exemplifying case on point about principal liability of subcontract labor is the well-publicized Wal-Mart case. From 1998 to 2003, the Department of Justice investigated the cleaning contractors used by Wal-Mart at more than 1,000 stores. In 2003, Federal agents raided 61 Wal-Mart stores in 21 states. After much fanfare and legal wrangling, it was Wal-Mart, not its cleaning contractors, which entered into an \$11 million settlement agreement while admitting no wrongdoing. (The cleaning companies that hired the illegal workers forfeited an additional \$4 million and pled guilty to criminal immigration charges.) The Wal-Mart agreement has since set the golden standard for employers protecting themselves against imputed subcontractor immigration violation liability.

F. Sample Crimes for Which Your Client Could be Convicted

Prior to today's enforcement environment, the INS of yesteryear focused on civil fines and occasionally would prosecute misdemeanor charges of hiring unauthorized workers under INA §274A. Today, it is much more likely that ICE would seek felony harboring and related charges such as smuggling under INA §274(a), or even money laundering charges, if the elements of these crimes are present. (Note the capital and lower case letters in the citations: §274A = misdemeanor. §274(a) = felony).

If criminal charges are being sought, it is imperative that counsel experienced in white collar criminal defense are retained to aid the client's owners, executives and supervisors charged with crimes. Typical criminal charges resulting from immigration violations are:

i. Harboring, Aiding and Abetting, Attempting and Conspiracy to Harbor

Maximum penalty: 10 years and the greater of \$250,000 or twice the gain to the individual defendant.⁶ Organizations can be fined up to \$500,000.⁷ The elements of harboring under INA §274(a)(1)(A)(iii) are: While knowing or reckless disregarding that a person has come to, entered or remains in the U.S. in violation of the law, one harbors, conceals or shields from detection that person who has come to, entered or remains in the U.S. in violation of the law.

⁶ 18 USC §3571(b)(3) and (d)

⁷ 18 USC §3571(c)

Generally, “harboring” in the employment context means hiring and/or continuing to employ a person while knowing or recklessly disregarding the fact that the employee is an illegal alien. In light of the Fisher Homes and Wal-Mart cases, “harboring” can also mean paying a subcontractor while knowing or recklessly disregarding that the contractor or its employees are illegal aliens. Evolving case law has indicated that some courts also require that in order to be convicted of “harboring” under the statute, the defendant must do some act with the intent to help the alien avoid detection by law enforcement.⁸

Obviously, an employer can also be convicted of aiding and abetting by helping someone else, such as a subcontractor, if while knowing or recklessly disregarding the fact that the person so helped is an illegal alien. Attempting to harbor, that is, trying unsuccessfully to harbor, is also a felony offence.

To conspire to harbor, the elements of conspiracy must be met; however, under a strict reading of the statute, INA §274(a)(1)(A)(v)(I), the conspiracy to harbor an illegal alien does not require an overt act.

ii. Money Laundering & Conspiracy

Money laundering occurs when money is used which are the proceeds of a “specified unlawful activity.” 18 USC §1956(c)(7). Violations of INA §274(a), such as harboring, aiding and abetting, attempting to harbor and conspiracy to harbor, are “specified unlawful activities.” Note that misdemeanor violations under INA §274A are not specified unlawful activities.

One also can be convicted of conspiracy to commit money laundering, if the offence is a crime under 18 USC §1956 or §1957, even if no money actually changes hands.

iii. Recruiting and/or Smuggling

It is unlawful for an employer to pay a recruiter for supplying employees when the employer or its agent, or any other person “acting directly or indirectly in the interest”⁹ of the company, knowing that the recruiter is supplying workers who are not legally present in the U.S..

Further, if the recruiter paid by the employer transports illegal aliens, if the employer knows or recklessly disregards knowledge of the same, the employer may also be subject to criminal smuggling charges under INA §274(a)(1)(A)(ii).

iv. Forfeitures and Seizures

Civil asset forfeitures can be larger than criminal fines, in fact, much larger. Under INA §274(a)(b)(1), any conveyance, including any vessel, vehicle, or aircraft, that has been or is

⁸ See *U.S. v. Belevin-Ramales*, 458 F. Supp. 2d. 409 (E.D. Ky. 2006); *Zavala v. Wal-Mart Stores*, 393 F. Supp. 2. 295 (D.N.J. 2005) (where a criminal complaint against Wal-Mart failed to properly allege that Wal-Mart, by virtue of its subcontractors’ knowing employment and housing of unauthorized workers, sheltered aliens for the purposes of concealing them and avoiding detection);

⁹ 8 CFR §274a.1(g)

being used in the commission of a violation of INA §274(a), “the gross proceeds of such violation, and any property traceable to such conveyance or proceeds,” can be seized and subject to forfeiture.

Yes, you read it right – gross proceeds, not net profits, can be seized, including any property traceable to such proceeds.

Upon conviction of a criminal harboring offense, the court “shall” order the forfeiture of any property, real or personal, that constitutes or is derived from or traceable to the proceeds obtained directly or indirectly from the crime and also any property that is used to facilitate (or intended to be used to facilitate) the harboring.

Money laundering forfeitures include all of the property “involved in” the money laundering offense. Arguably, this is even greater than gross profits and proceeds under the harboring offenses.

II. IMMIGRATION REQUIREMENTS IN FEDERAL AND STATE CONSTRUCTION CONTRACTS – E-VERIFY

A. E-Verify

On November 14, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a Federal Acquisition Regulation (FAR) final rule (FAR case 2007-013, Employment Eligibility Verification) that implements certain executive orders of Presidents Clinton and Bush. All Federal contracts awarded and solicitations for Federal contracts issued after September 8, 2009 now include a clause requiring government contractors to use E-Verify. The same clause also will be required in subcontracts over \$3,000 for services or construction.

Contracts exempt from this rule include those that are for less than \$100,000 and those that are for commercially available off-the-shelf items. Companies awarded a contract with the Federal government will be required to enroll in E-Verify within 30 days of the contract award date. They also will need to begin using the E-Verify system to confirm that all of their new hires and their employees directly working on Federal contracts are authorized to legally work in the United States.

If it is necessary for a contractor to enroll in E-Verify, the contractor must register online with the DHS and accept the terms of a Memorandum of Understanding (MOU). The E-Verify MOU is attached as Attachment F. By entering into the MOU, the contractor agrees to use the E-Verify system for all employees hired after enrollment, and in some cases, to verify some existing employees assigned to Federal contract work. Employers can register for E-Verify online by going to the DHS website. In most circumstances, an employer can only E-Verify new hires not current employees and must run the E-Verify query within three days of hire. Another consideration is that E-Verify employers can only accept documents on List B of the I-9 form with a photograph. Finally, E-Verify participants must agree to have their E-Verify records reviewed by DHS and to have company officials and employees participate in E-Verify

interviews upon request. These rules, and many others, are set forth in the MOU between the employer, DHS, and SSA. When enrolling in the E-Verify program, contractors must select an option that designates them as a Federal contractor.

Generally, the contractor must screen the employee through E-Verify after an offer of employment is accepted and after the Form I-9 is completed. E-Verify must be completed no later than three days after the employee's actual start date.

Contractors who have a choice of whether or not to enroll in E-Verify should consider carefully whether they should participate in E-Verify. E-Verify relies on government databases that have been acknowledged (even by the Director of the DHS) to have significant error rates.

Further, by entering into an MOU, the contractor may be waiving Fourth Amendment rights by allowing the government full access to its employment records. The MOU contains provisions allowing the Federal government and its designees to conduct site visits and interview employees, in addition to granting full access to employment records. The level of obtrusiveness of E-Verify may be simply too much for some businesses to accept.

In addition, while verifying work authorization under E-Verify grants a presumption that the employer has not knowingly hired an unauthorized worker, the participation in E-Verify does not provide any safe harbor for enforcement efforts by ICE. Indeed, the employer is now directly providing information to the government that can be used in worksite enforcement efforts against the employer.

Also, while the MOU provides that "no person or entity participating in E-Verify is civilly or criminally liable under the law for any action taken in good faith on information provided by the confirmation system," the contractor is not protected against claims and charges of discrimination. The employer may have to defend itself against a claim of discrimination in order to show that it acted in good faith reliance on the results provided by E-Verify in making a hiring decision and not on some other discriminatory charge alleged in a complaint.

B. State Construction Contract Immigration Requirements

As referenced above, most North Carolina Department of Transportation contracts contain in the bid proposal's Standard Special Provisions (usually on pages 19-20) a certification that is made by placing the bid that neither the prime contractor nor its subcontractors are "not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency." By and large, at least today this is the most common type of immigration requirement in North Carolina's construction contracts.

Bills have been introduced in the legislature that would significantly change the immigration compliance climate in North Carolina for contractors. For example, Senate Bill 32 (2009 Session, currently before the Committee on Appropriations/Base Budget) proposes to require all contractors working for county projects (by adding G.S. §153A-15.2); cities (adding G.S. §160A-12.1); or any other board, governing body, institution, and other political subdivisions (amending G.S. §143-129) to participate in E-Verify.

Further, this bill as currently written proposes to require all employers to participate in E-Verify, provides for the loss of business licenses for any violations of Federal immigration laws relating to the employment of unauthorized aliens, and from anonymous, unverified tips and provides for investigations of employers by the Attorney General, county attorneys and sheriffs and local law enforcement agencies.

Taking a non-legislative approach, some local governments have been inserting various immigration requirements in local economic incentive packages and development agreements that may impact the construction practitioner. Generally, these requirements have been included as “addendums” to agreements and are added at the request of one or more board members of the local government.

Immigration addendums should be carefully scrutinized for provisions allowing the local government to obtain copies or inspect I-9 forms of the contracting entities, for making its own determinations of immigration status, and more importantly, for making provisions that purportedly impute liability on the project owner or its contracting entities for its subcontractors on the project. These addendums, taken at face value in some cases could result in the forfeiture of millions of dollars of economic incentives if a single worker on the project is determined by a local official untrained in the vast nuances of immigration law to be unauthorized. Often the addendums provide little to no due process for the owner or contracting entity and no recourse.

The best practice is to negotiate the addendums completely out of the agreement. However, sometimes this is not possible due to local political concerns. In this case, addendums should be renegotiated to allow all immigration-related worksite enforcement efforts and determinations of worker status to be performed by the relevant Federal agencies in compliance with Federal law, thus keeping in place all of the due process protections afforded under Federal law.

Also, such addendums may require annual certifications that the owner or contractors working on the project deliver a certification that the owner and/or its contractor is not employing illegal workers and that there are no pending claims against the owner or contractor that unauthorized workers are employed in the course of the project. These requirements must be carefully scrutinized. While providing periodic certifications that the owner or its contractor does not “knowingly employ unauthorized workers” may be fine, make sure that this standard is met only after all due process is exhausted in accordance with the Federal regulatory scheme.

Further, certifications regarding pending claims should be carefully negotiated, and preferably negotiated out of the agreement. At any time a “pending claim” can arise during the course of the project. Employers of all types and sizes can have a “pending claim” for immigration violations, which claim arises by implication whenever a U.S. DOL, the OSC, ICE, or even sometimes by state agencies, opens an investigation. For example, disgruntled employees are frequently the impetus of such investigations – a fired worker only has to complain about a wage and hour issue to the U.S. DOL for a pending immigration violation claim to be triggered. The U.S. DOL in many cases uses a wage and hour claim to include an I-9 investigation in an attempt to uncover immigration violations. Under the plain reading of some addendums, even a typical wage and hour claim could prevent the GC from providing the required certification.

Even with the best I-9 compliance efforts by the contractors on a project, sometimes unauthorized workers exist. Under Federal law the contractor is afforded safe harbor protections if they have fulfilled all of the requirements under Federal regulations.

III. WORK-RELATED VISAS AVAILABLE TO THE CONSTRUCTION INDUSTRY

Unfortunately, there are no specific visa classifications afforded to the construction industry. In fact, most immigrant and non-immigrant visa classifications will be completely unavailable to workers in this industry.

Often workers in the construction industry approach their employers seeking to “get legal.” Usually, the worker has entered the U.S. without inspection (termed “EWI”, or entry without inspection), and unless very unusual circumstances exist, there is little that can be done while the worker is in the U.S. and employed by the company.

Moreover, at this point the employer is placed in a particularly difficult position with respect to the worker. If the worker approaches the employer with such a request, usually there has been a significant amount of trust built up between the employer and the worker. The employer will commonly want to help out its valued employees. However, under the regulations and statutes cited above in this article, the employer must immediately terminate the worker’s employment or face possible civil and criminal penalties for knowingly continuing to employ an unauthorized worker.

One possibility exists in the H-2b visa, but the relatively restrictive requirements and costs for obtaining an H-1b visa often outweighs the benefit to the company of obtaining the visa for an individual worker. The H-2b visa classification is available for temporary workers for a seasonal need, a peakload need, a one-time occurrence or an intermittent need. The period of employment must be a year or less unless there are extraordinary circumstances. 8 C.F.R. §214.2(h)(6)(ii). Seasonal or peakload need of longer than 10 months, which is of a recurring nature, will not be accepted under the H-2b visa category. In particular usefulness to contractors, to determine whether a job is temporary the USCIS does not look to the nature of the duties of the job performed, but rather to the employer’s need for temporary workers. 8 C.F.R. §214.2(h)(6)(ii)(B).

In order to qualify for an H-1b visa the employer must get temporary labor certification from the U.S. DOL demonstrating that no U.S. citizens or legal permanent resident workers are available for the position and that the employment of aliens will not adversely affect wage rate and working conditions of similarly employed workers in the U.S.. 8 C.F.R. §§214.2(h)(6)(i), (6)(iv)(A)(1).

Under the seasonal need qualification of this classification, the labor to be performed must be traditionally tied to a season of the year by an event or pattern and be of a recurring nature. The contractor must specify the times that the labor will not be needed and these times cannot be unpredictable, subject to change, or vacation.

Under the peakload need qualification, the labor must be needed to supplement the contractor's permanent staff and the temporary additions to staff will not become permanent. Under intermittent need, the employer must need labor occasionally or intermittently for a short period of time and has not employed permanent or full time workers for the position.

One complicating factor for roadway construction projects utilizing H-2b workers is that if the work is done in more than one location, the visa petition to the USCIS must include the itinerary of locations and dates of work in each location. Also, the employer must demonstrate that there is no labor dispute at the workplace.

In obtaining temporary labor certification approval, the employer must document its efforts to advertise and recruit workers and must pay the prevailing wage. Further, the job positions advertised cannot have unduly restrictive job requirements or a combination of duties. The employer must coordinate its efforts under Department of Labor regulations with the NC Employment Security Commission, which will place job in its job bank for 10 calendar days. During the 10 day posting by the NC ESC, the employer must place advertisements for three consecutive calendar days in local newspapers.

The ad must describe the job opportunity including hours, rate of pay, duration of employment and all locations of employment, state the minimum requirements, identify the employer, direct applicants to report or send resumes to the ESC, and state the number of job openings. The employer must provide the ESC with tear sheets or other proof of publication. Further, the employer must document use of union and other recruitment sources.

While the H-2b visa may be of limited usefulness for individual workers, multiple beneficiaries of an H-2b visa may be requested if they will do the same type of work on the same terms and conditions in the same occupation and area of employment. For example, if the contractor can demonstrate that it needs a number of workers for seasonal employment and cannot otherwise find U.S. workers to perform the work, the cost and hassle of complying with the various regulatory requirements can be effectively spread out over a number of workers, lowering the overall cost to the contractor to obtain foreign, legal workers at its job sites.

IV. BEST PRACTICES FOR IMMIGRATION COMPLIANCE IN THE CONSTRUCTION INDUSTRY

Clients in the construction industry must be mindful that they are one of the most prominent targets of enforcement efforts by ICE. Further, if the client is dependent on Federal contracts the client must understand the importance of compliance or suffer the possible corporate death penalty of debarment from Federal contracts.

A. Corporate Policies Should Advocate a Culture of Compliance

The first line of defense is to instill a climate of corporate compliance to avoid violating immigration laws. A corporate immigration policy should be developed, followed and reviewed

at least annually. Having a corporate policy in place helps to make certain that all employees are aware of a uniform policy. Also, such a policy can serve as a document to help demonstrate good faith attempts to comply with immigration law if enforcement efforts are commenced.

The policy should address, at a minimum:

That the company will only hire foreign nationals with authorization to work for the company;

That any employee with knowledge or constructive knowledge that a foreign national is working for the company without authorization must reveal this information to designated management;

That any employee who accepts a document known to be counterfeit for verifying identity or work authorization of a prospective hire will be terminated;

That foreign national employees who are found to be without valid work authorization will be terminated;

An internal system to track status expiration dates of foreign national employees;

A comprehensive I-9 compliance policy, including the time of completion of I-9s, acceptable documents (tracking exactly the acceptable documents identified on the most current I-9 form), policy regarding updating I-9 forms, where forms are kept, whether or not copies of documents are retained, and policy regarding retention of I-9 forms;

Policies regarding avoiding national origin and citizenship discrimination;

Policies regarding document abuse, that is, employers may not request or demand with discriminatory intent, more or different documents than those minimally required to complete the I-9 Form;

Questions that may and may not be asked during the interview process.

B. Perform Internal Audits

In addition, construction clients should be encouraged to conduct an audit of their existing I-9 forms and policies. Independent companies can be hired to conduct such audits, companies may wish to undertake their own audits. However if I-9 audits are performed by counsel the attorney-client privilege will protect the findings of the audit from discovery should the results of any audits be demanded in a subpoena or warrant. Usually, the results of I-9 audits performed by counsel can be startling to management and owners of companies.

C. Do Not Hire Employees at the Job Site

Construction clients are frequently tempted to hire workers who show up unannounced at job sites. At best, paperwork is quickly completed on the hood of a pickup truck, thrown behind the seat and lost in the mess. Jobsite applicants are often armed with counterfeit documents and/or excuses why they don't have their documents with them. Contractors must resist the urge to hire a good worker on the spot and require jobsite applicants to appear at the main office, complete an application and interview, and complete the I-9 Form and/or E-Verification process.

D. Regarding Subcontractors, Consider Going to Wal-Mart

As mentioned above, the Wal-Mart settlement produced the most conservative and protective approach to prime and upper-tier contractors. The Wal-Mart model can be used by owners and contractors to require contractually their subcontractors and lower-tier subcontractors to fulfill the following, to lessen the risk of imputed liability:

To have properly completed I-9 forms for each employee working on the project;

To retain photocopies of all supporting documents (i.e., identity and employment eligibility cards presented by employees);

To cooperate in the event that the general contractor or government seeks to audit the contractor's I-9 records;

To agree to contract language that the subcontractor is responsible for employee verification and compliance with immigration laws, to implement an immigration-related compliance plan, to indemnify the general contractor of any penalties or liabilities assessed to the owner or general contractor as a result of violations by the subcontractor, that lower-tier subcontractors must abide by the same standards, and that the contract can be terminated due to immigration violations by the subcontractor;

To provide a certification letter to the contractor stating that the subcontractor has complied with the verification requirements under the pertinent regulations and the contractor's agreement.

An unresolved issue is whether by taking some steps of the Wal-Mart approach could, in effect, actually increase the risk to owners and contractors that the immigration sins of their subcontractors be imputed. Conceptually, the Wal-Mart element that allows the general contractor to audit its subcontractors' I-9 forms could form the basis of an argument that the general contractor had constructive knowledge, or if an audit was performed by the general contractor, perhaps actual knowledge that unauthorized employees were working on the project.

Further, keep in mind that the Wal-Mart approach was forged from a settlement agreement with the government. The requirement that the subcontractor retain supporting documents was likely intended as an aid for follow-up government enforcement efforts so that investigators could easily review the documents presented by the employee and reviewed by the employer. Because

the I-9 regulations do not require that supporting documents be retained, contractually requiring subcontractors to retain such documents could put the subcontractor in a pickle between following their own counsel's advice to not retain documents versus working on the project.

E. Consider Participation in Government Programs

There are two programs in which employers can enroll to help avoid immigration violations. Participation in E-Verify, discussed above, may be required by Federal law and sometimes state law. A second, purely voluntary option is for the company to enter into the ICE Mutual Agreement between Government and Employers (IMAGE).

IMAGE is being advocated by the DHS as being the “best practice” available to private companies in immigration compliance, one that is hoped by the agency to become an industry standard. According to ICE’s website:

By voluntarily participating in the IMAGE program, companies can reduce unauthorized employment and the use of fraudulent identity documents. As part of IMAGE, ICE and U.S. Citizenship and Immigration Services (USCIS) will provide education and training on proper hiring procedures, fraudulent document detection, use of the E-Verify employment eligibility verification program and anti-discrimination procedures. Employers seeking to participate in IMAGE must agree to:

- Complete a self-assessment questionnaire;
- Enroll in E-Verify;
- Enroll in the Social Security Number Verification Service;
- Adhere to IMAGE Best Employment Practices;
- Undergo an I-9 audit conducted by ICE; and
- Review and sign an official IMAGE partnership agreement with ICE.

Upon enrollment and commitment to DHS’s best hiring practices, program participants will be deemed ‘IMAGE Certified’ – a distinction DHS believes will become an industry standard. The results of the IMAGE program and participation in IMAGE by partners in industry will serve to guide DHS in shaping future worksite enforcement policy and legislation.¹⁰

In considering IMAGE, employers should consider whether enrollment is in their best interest. For example, IMAGE requires the use of E-Verify, in which the MOU provides for the inspection of personnel records, I-9s and employee interviews, waiving possible protections under the Fourth Amendment.

Further, the employer must allow an I-9 audit to be conducted by ICE, agree to promptly self-report violations or discovered deficiencies, and establish a tip line for employers to report activity relating to the employment of unauthorized workers. Further, in adhering to ICE’s best practices as required under the program, the company must submit annual reports to ICE.

¹⁰ <http://www.ice.gov/partners/opaimage/index.htm>

In return for all this, there is no guarantee that ICE would communicate with cooperative employers about suspected problems, hold off of enforcement efforts, raids, or reduce penalties for immigration violations discovered in the process. At best, it may be a mitigating factor in showing good faith efforts and may minimize criminal charges against employers. However, reflecting against past enforcement efforts against employers who participate in E-Verify, it is likely that ICE would use the results from an employer's voluntary participation in IMAGE to augment any investigation commenced against the employer.

Before entering into the IMAGE program, companies should carefully consider whether waiving important Fourth and Fifth Amendment protections are worth the perceived benefits of the IMAGE program. Many owners of construction companies would simply not welcome this level of intrusion into their workplaces.

Appendixes:

- A – ICE Internal Memoranda Regarding Worksite Enforcement Strategy
- B – Sample Notice of Inspection and other Sample ICE Notices
- C – Technical Deficiencies List
- D – Civil Warrant Application and Supporting Affidavit
- E – Sample NC DOT Contract Provisions Regarding Immigration
- F – E-Verify Memorandum of Understanding