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Scrutinize Contractor Hires to Avoid Wal-Mart Problem

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Most American employers are quite familiar with the first provision of the Immigration Reform and Control Act of 1986, which specifically prohibits the hiring, recruitment or referral of an alien not authorized to legally work in the United States. A much lesser-known provision, provision four, outlining the use of labor through contractors, subcontractors or exchanges is now obscure no more, having been brought to the forefront of public attention thanks to a landmark settlement involving Wal-Mart Stores, Inc.

While avoiding criminal charges, the retail giant, whose annual sales in 2004 reached $288.19 billion, has agreed to pay a record $11 million in fines to the federal government to resolve charges of the employment of illegal aliens by independent contractors of janitorial services. The settlement was the culmination of a series of raids and investigations dating back to 1998, which resulted in the arrests of over 350 allegedly illegal aliens. The twelve corporations who actually hired the undocumented aliens plead guilty to criminal immigration charges and agreed to pay a further total of $4 million in fines.

Though Wal-Mart pleaded ignorance, stating that the janitors directly worked for the independent contracting companies and not for Wal-Mart itself, the federal government, specifically the US Immigration and Customs Enforcement (ICE) unit, the largest investigative agency of the Department of Homeland Security, dismissed Wal-Mart's claims, stating that corporate responsibility in this case cannot be passed on. Furthermore, ICE intends to use this case as a precedent for not just large scale corporations but smaller operations as well. In fact, any company who is using illegal aliens, whether directly or indirectly, will be open to investigation and full prosecution if in violation of immigration laws.

Aside from the payment of the fine, Wal-Mart has agreed to full cooperation with the investigation as well as the consent of a decree prohibiting the company from ever hiring, recruiting, or continuing to employ unauthorized aliens in the future. They are also mandated to maintain their prior programs of verifying the work authorization status of Wal-Mart's direct employees, while staying within the limits of anti-discrimination laws.

Additionally, two other terms of the agreement specifically concerned the implementation of new and stronger internal controls in order to ensure future compliance and enforcement of immigration laws. Firstly, Wal-Mart was required to provide all present and future store managers with training on their legal obligations regarding immigration while maintaining adherence to anti-discrimination laws. With this ordinance ICE is emphasizing the importance of educating managers not only on legal regulations, but also training them on what they should be looking for in order to recognize potential violations.

Secondly, Wal-Mart was directed to develop, as part of its compliance programs, a method to verify that the independent contractors used by the company are also in compliance with immigration laws in their employment practices. Contrary to traditional business and immigration practices where independent contractor agreements assumed a level of distance and minimal control between an employer and the independent contractors, ICE is plainly stating that if immigration violations are involved, the employer could very well be held accountable for its contractor's hiring practices.

What does this landmark case mean for employment and corporate attorneys whose clients comprise the legions of corporations that use independent contractors hiring potentially undocumented lower-wage workers, including grocers, wholesalers, food processors, construction companies, garment manufacturers and others? Quite simply, their clients must now assume themselves greater vigilance to the adherence of immigration employment regulations, whether they are directly or indirectly hiring the workers in question. With the Wal-Mart case serving as a precedent, ICE is affirming that the government is no longer putting immigration enforcement on the backburner.

However, before employers venture into the verification of the practices of their contractors, their attorneys should advise them that they must first confirm that their own internal employee practices are in full legal accordance. Of utmost importance is the implementation of company-wide policies and procedures concerning the authorization and verification of employment. Also critical is the training of company managers, who as supervisors have the most significant day-to-day interactions with employees, in the practices and processes involved, including the completion of I-9s (the Employment Eligibility Verification Form).

Moreover, the hiring of foreign nationals should comply with proper procedures as required by USCIS (US Citizenship and Immigration Services) with petitions filed well in advance of the engagement of the alien worker. Companies should also re-verify the employment status of current employees as necessary, utilizing extended work authorizations. Finally, a system of regular audits of company I-9 practices is also essential to ensure that the organization is in continual compliance with all federal immigration laws.

Furthermore, in reference to contractor records, though employers do not legally need to go as far as reviewing their contractor's employee records to verify proper documentation, under their attorneys' counsel, they may contractually require independent contractors to furnish them with copies of I-9s and other documentation for the workers brought on-site. At a bare minimum, attorneys do need to ensure that their clients' independent contractor agreements include terms stating that the contractor will comply with all measures regarding immigration regulations, the verification of I-9s among them, and that the contractor will recompense the employer should any liability charges arise out of noncompliance issues.

In conclusion, with the Wal-Mart case the federal government is sending a strong message to employers nationwide: one of their main areas of focus is and will continue to be the enforcement of federal immigration statutes. Claims of ignorance do not preclude liability; civil and criminal prosecution will assuredly result if employers hire contractors that employ illegal immigrants. However, by taking a proactive approach and implementing an internal system of the above mentioned controls and audits regarding adherence to immigration laws, employers should be able to minimize their risk for federal violations, and thus avoid the possibility of a Wal-Mart type investigation in their own enterprise.

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