

Immigration Enforcement

By Amy L. Peck & Nicola Ai Ling Prall

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Meet the Authors



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Transcript

INTRO

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CONTENT

Nicola Ai Ling Prall

Principal, Raleigh

I'm happy to be here talking with Amy Peck today about what we might be able to expect from the Trump administration with regard to immigration and, specifically, worksite enforcement.

Usually, when we have a presidential year and a change in administration, our looking ahead is a little bit more speculative. But we've had a preview of what the Trump administration will do with immigration. So, we know a little bit more about what we can expect. He's also said a lot on the campaign about what we might expect, especially when it comes to worksite enforcement.

Amy L. Peck

Principal, Omaha

That's right. With Trump's announced immigration appointments, and because there was a previous term, we know how some of these folks are going to behave, such as Stephen Miller. Trump has also made a lot of campaign statements. Because of those

statements, along with the behavior of the previous administration, we are virtually certain we're going to see an increase in enforcement.

The last time Trump was in office, we saw a surge in immigration enforcement priorities, including worksite inspections, I-9 audits, employer responsibilities regarding employee work authorizations and worksite enforcement actions, also known as raids. I think it's safe to say that employers should be prepared for an uptick in all of these activities.

Pral

For sure. If we start by looking at what we saw during Trump's first term, we did see that increase in ICE raids, specifically targeting employers that had larger numbers of undocumented workers. These are folks who don't have good work authorization. These were really large-scale operations that involved multiple agencies. For example, in 2018, there was a really large raid at an animal processing plant, and nearly 700 workers were detained just out of that one facility.

Peck

That's right. To be clear, raids are officially known as worksite enforcement actions. Raid is the nomenclature that's used in the media. These are very large-scale operations, as Nicola said. There are subpoenas involved, a lot of enforcement personnel, and a lot of planning. The government typically tips off the media. So, the media is there to record it all, and they are very flashy. There are lots of headlines. However, in terms of long-term effectiveness, they're not very effective. It does grab the headlines, which is what we think that the Trump administration wants. It's in part, why it was done last time. So, that's going to happen again.

The employer may not actually know that they have undocumented workers at the facility. However, if there are a number of factors in the particular mix, such as it's a job that's difficult to fill because it's difficult, low paying, one that's not attractive to a U.S. worker, it would attract normally undocumented workers working under an assumed identity or borrowing somebody else's identity. That is the type of employer who should be paying particular attention to compliance and doing some preventative care, as they say, to be ready for this type of action.

I think it's also noted that there were targeted areas. The Trump administration already said that Chicago, for example, is going to be one of those targeted areas. I don't think we can assume that it's only going to be so-called 'blue areas' or 'blue states' because, during Trump [term] one, most of the raids were in red, so-called 'red areas' There were some agriculture raids in Nebraska. There were some other ones in traditionally conservative states. I don't think that we can just draw a line and say, 'red states, you're safe.' I don't think it's going to be that at all.

It's also worth noting that the Trump administration has emphasized the goal of removing "all undocumented workers from the U.S." It's likely that there will be an effort to go after employers that are low-hanging fruit, in part to have a deterrent effect and to make public examples for these enforcement actions. I want to say one more thing. The goal of removing "all undocumented workers," it's not going to happen. We don't have the personnel. We don't have the infrastructure in place. Plus,

it would be absolutely devastating to our economy because a lot of these folks are contributing to the economy. So that is more puffery, if you will, more of a campaign bluster.

But we definitely will be seeing an uptick in enforcement actions, including the removal of undocumented folks.

Pral

For sure. To your point about it not just being 'blue states,' we did see a lot of really large raids take place in areas like Mississippi, which is deeply, deeply red during the last administration. It had significant negative impacts on the local economy when that happened.

It wasn't just these large-scale flashy worksite enforcements that increased under the first Trump administration. We also saw an increase in I-9 audits. We do anticipate that we're going to see an increase again in I-9 audits with a second Trump administration.

Peck

That's right. There really can be no doubt because the Biden administration did very few I-9 audits. There's only one way to go, and that's up. The Trump administration had a marked increase in I-9 audits before and has stated publicly that that's going to be coming back. Frankly, there are still some audits that were opened up during the Trump administration that are still open because they did so many that the auditors couldn't actually get through the audits. They would collect the documents, but they couldn't finish the audit because there were so many. It caused a backlog. That could happen again because you need to hire more auditors to complete the increased number of audits which is something that this incoming administration probably is loath to do. It's going to be interesting.

Not only did the I-9 audits increase but there was also an increase in fraud detection and national security audits. That's the unit that investigates employer compliance with immigration laws, particularly visas. FDNS audits were also becoming a tool for increasing the scope of enforcement. Looking at overall employment practices, including the use of E-Verify and whether employers were properly classifying workers. That's really a crossover between immigration and employment where they use immigration to cross over into this other area of the law. Employers really need to have a broad scope when they're looking at their compliance practices.

Pral

Absolutely. L-1, H-1B. These fraud detection and national security audits, also called FDNS, are fully funded by the fraud fees that H1 and L-1 petitioners or employers who sponsor H-1B or L-1 workers. As these employers know, with each filing, they pay a \$500 fee. That goes towards funding this unit of Homeland Security, which can, does and did during the Trump administration, as well as some during the Biden administration, visit the employer's work site--- or they'll reach out via email, sometimes directly to a foreign national and to the employer, to make sure that they're abiding by the terms of the H-1B or L-1 program.

That includes making sure the workers doing the work that was outlined in the petition are getting paid the wages that are listed on the Labor Condition Application, which is also known as the LCA, a required part of the H-1B. There are these Department of Labor regulations that pretty strictly regulate the wage that has to be paid and where the work can be performed. All of these are checked during an FDNS audit.

It is important for employers to think that these are not just paperwork reviews. They almost always involve an in-person inspection and a review of the business practices to ensure compliance. This is a great opportunity to look at that crossover of immigration and employment and remember that sponsored workers also have to be in compliance with all of your other employment laws as well.

Peck

In addition to an increase in worksite compliance measures, we believe the new Trump administration is also going to push for mandatory E-Verify. This would take some budgeting because E-Verify's infrastructure will likely need to be strengthened to handle this increased load. It is a very popular talking point, which is already being bounced around on the Hill.

These potential new measures or policies won't happen overnight on January 20th. Although we're hearing that there are three to five immigration changes or executive actions that will be taken within 24 hours of January 20th. We don't know what they are, but we definitely need to prepare for what will be certainly a more stringent worksite compliance administration and very big changes that will impact the foreign national workforce.

Pral

Definitely. This is a great time for employers to standardize their hiring and verification procedures across their organization. We don't know what's going to happen. We have had a preview. We expect there's going to be some day-one things. Maybe a travel ban right away. That's probably going to be a day-one immigration-related executive order.

What can employers do before that time or even in that time, since these enforcement actions aren't all going to drop on January 20th? In getting ready for this more stringent environment, look at hiring practices and verification procedures, make sure all the HR professionals and hiring managers are following the same processes for I-9 completion, E-Verify use, verification of work authorization and have a really solid policy and standard operating procedures in place so you have that consistency.

That means going in and asking. You may have some standard operating procedures written down, but make sure that they're being followed as well. People aren't always checking, or people aren't always following through with all of the next steps that you so painstakingly already wrote down so that we can make sure that what we have in writing matches what's happening in reality consistently.

Peck

As we're wrapping up this short podcast, here are some steps. It's a great time to do an

audit of your I-9s. We strongly suggest having an attorney help or competent outside eyes, just like you don't perform surgery on yourself. You often won't recognize issues with I-9s if you do it yourself. The idea is to flag any gaps in compliance before the government gets in there.

Some sectors have higher levels of undocumented or foreign national workers: agriculture, construction, hospitality, food service, landscaping, warehouse and some manufacturing. If you're in one of these industries, you need to be working closely with your compliance lawyer to prepare for audits and potential worksite enforcement actions like having a plan in place if they show up at your door with a subpoena. Everyone should know what to do so they're not in the middle of the bullseye and putting themselves in harm's way.

Pral

Definitely, and any internal review. If an employer has employees that they sponsor in any kind of visa status, do an audit of your immigration files and your public access files. If you have H-1B workers, make sure that all of the workers are working in compliance with the petitions and LCAs that were submitted to the Department of Labor and Immigration in support of these visa statuses.

If you do discover that there are material differences that require an amendment to be filed, reach out to counsel, file those amended petitions and get ahead of these potential issues before we see the expected, if not almost certain, increase we're going to see in audits.

Peck

Finally, employers should stay informed about changes in immigration policy. We have a blog, <https://www.globalimmigrationblog.com/> where we'll be blogging about this constantly. Certainly, there are other resources out there, but staying on top of it is essential.

Pral

Yes, Amy and I are going to be back after the inauguration to kind of talk about those day-one or early increases that we see happening in immigration. Stay tuned in and definitely follow along with our immigration blog because that's where we push out the information as soon as we have it.

Peck

Thanks for tuning in today and if you need additional guidance, please reach out. We appreciate it.

OUTRO

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