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Practice Focus: Immigration Compliance

Southeast Sees Increase in Business Immigration Raids

by [Todd P. Photopoulos](#)

During the last few months, we have seen nearly 1,000 employees arrested for immigration violations. The Department of Homeland Security's Immigration and Custom Enforcement (ICE) agents have been quite busy in the Southeast region. Nearly 600 employees were arrested on August 25, 2008, at Howard Industries, Inc.'s transformer manufacturing facility in Laurel, Mississippi. ICE arrested 300 workers on October 7 in Greenville, South Carolina at House of Raeford's Columbia Farms Chicken Processing Plant. These are the latest in a growing trend of immigration enforcement activity in the area.

In the last two years, ICE has dramatically increased it's administrative and criminal arrests. Administrative arrests have increased by 570%, while criminal arrests have increased by 2,100%. What is more troubling for employers is the government's switch from administrative arrests to criminal arrests. In other words, instead of paper fines, ICE is seizing assets and

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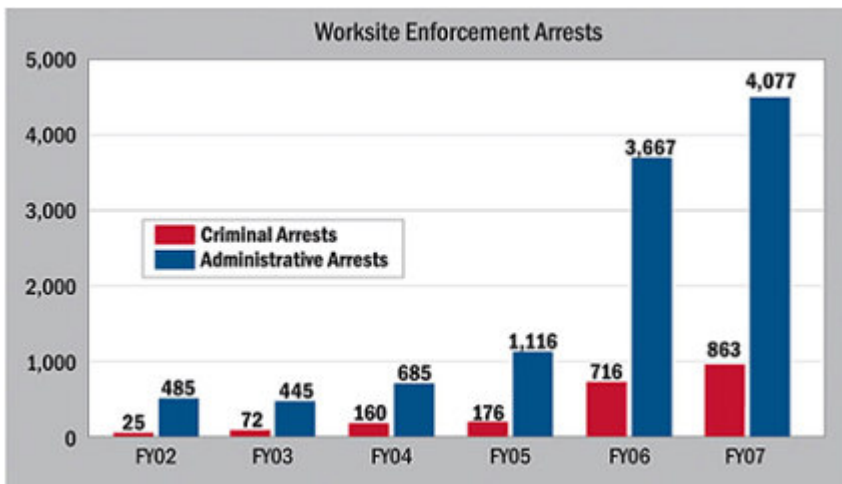
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putting individual managers and owners in jail. "Administrative arrests" refer to arrests of aliens who are unlawfully present in the United States. "Criminal arrests," on the other hand, charge an employer's decision-makers for knowingly employing or assisting illegal aliens in their efforts to obtain employment in the U.S. These "decision-makers" include owners, supervisors, HR managers, and corporate officers. The following chart shows this dramatic increase in activity through 2007, the last full year of reported activity by ICE:



In switching its focus, ICE has found criminal sanctions to be a far greater deterrent to illegal employment schemes than administrative fines. ICE has copied a few pages from federal drug enforcement's successful playbook by seizing personal and corporate property and bank accounts. In Fiscal Year 2007, ICE secured more than \$30 million in criminal fines, restitutions, and civil judgments in worksite enforcement cases, including the criminal arrests of 863 people. In its criminal cases, ICE has been pursuing charges of harboring illegal aliens, money laundering, and/or knowingly hiring illegal aliens. Harboring illegal aliens is a felony with a potential 10-year prison sentence. Money laundering is a felony with a potential 20-year prison sentence.

As of August 2008, ICE had made more than 1,000 criminal arrests tied to worksite enforcement investigations. The overwhelming majority of these occurred in the Southeast region. Of the 1,022 individuals criminally arrested, 116 included owners, managers, supervisors, or human resources employees. Thus, 11% of those criminally arrested included owners or managers who are now facing charges of harboring or knowingly employing illegal aliens. To date, ICE has also made more than 3,900 administrative arrests for immigration violations during worksite enforcement operations in 2008.

Given this increase in activity and the switch in focus to bringing criminal charges against managers, owners, supervisors, and human resource officials, employers would be well-advised to review their current I-9 immigration compliance policies. Employers may also wish to conduct an internal compliance audit. Compliance audits are helpful in establishing affirmative defenses to charges of knowingly employing illegal aliens.

Significantly, the Howard Industries raid was the result of a disgruntled union tipping off ICE. Given the shift to a pro-labor White House, undoubtedly we will see an increase in union organizing. Unfortunately, this type of "corporate attack" is a hallmark of big labor in their effort to apply pressure to employers. Therefore, now is also a critical time to be looking at your employment policies and union avoidance programs. [back to top](#) 📄

Mississippi Mandates Employer Registration With E-Verify to Determine Employee Work Authorization
by [Carlyle C. White](#)

This Summer, Mississippi added itself to the growing number of states mandating employer participation in the Federal E-Verify Program. On July 1, 2008, the Mississippi Employment Protection Act (MEPA) went into effect. MEPA will require all Mississippi employers to register with and utilize the federal E-Verify system to validate employee work eligibility. E-verify is an internet based employment status verification system, operated by the U.S. Department of Homeland Security, that provides feedback to determine whether individuals are legal citizens or legal aliens authorized to work in the United States.

The Act calls for a phased-in approach to compliance based on the number of employees in the employer's business. Employers must be using E-Verify by the following deadlines:


- State and municipal agencies, public contractors and subcontractors, and private employers with 250 or more employees must have complied with MEPA by July 1, 2008;
- Employers with 100 to 249 employees must comply by July 1, 2009;
- Employers with 30 to 99 employees must use E-Verify by July 1, 2010;
- For all other employers with fewer than 30 employees, the compliance deadline is July 1, 2011.

MEPA mandates covered employers to use E-Verify to confirm the work status of all newly hired employees. The statute also specifically requires contractors and sub-contractors employed by the State to register with and use E-Verify for new hires. This State contract provision, however, is not retroactive on contracts formed on or before July 1, 2008. In addition, third-party employers (such as leasing companies, temporary labor firms, and contract employers), must register to do business with the Mississippi Department of Employment Security and document to all employers it conducts business with that an E-Verify inquiry was performed on the employees provided.

Furthermore, MEPA creates a cause of action for unlawful discrimination if an employer discharges a legal employee in Mississippi while retaining an employee hired after July 1, 2008, who the employer knows or reasonably should have known is an unauthorized alien. The employer, however, may rely on the use of E-Verify to validate an employee's work status as an exemption to liability under this provision.

An employer who is found violating the MEPA's E-Verify requirements will be subject to termination of any State or local contract held and prohibited from contracting with the State for up to three years. In addition, an employer may lose their Mississippi business license, permit, or certificate for up to one year.

MEPA also creates criminal penalties for persons knowingly employing illegal aliens. The Act provides a fine of at least \$1,000 and up to \$10,000, as well as imprisonment for at least one year and up to five years. These fines and penalties are in addition to the substantial Federal liabilities and penalties.

In light of recent investigations on Mississippi employers for allegations of illegal immigration, now is the time to review the work status of all employees for compliance with employment verification laws. Registration for E-Verify may be completed at the following website: <https://www.vis-dhs.com/employerregistration>. [back to top](#) 

On the Horizon


Six Labor and Employment Cases Scheduled Before Supreme Court During 2008-2009 Term

by [Graham W. Askew](#)

The United States Supreme Court is scheduled to open its 2008-2009 term

with six labor and employment cases. The scheduled cases cover a broad spectrum and will potentially result in significant changes to the landscape of labor and employment law. A brief summary of the issues to be addressed are set forth below:

- *Locke v. Karass*: The Supreme Court will determine whether a public employee union may charge nonmembers "agency fees" for litigation expenses incurred by the international union on behalf of other bargaining units but funded by a pooling arrangement.
- *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan*: The Supreme Court will address the issue of whether a qualified domestic relations order is the only valid way under ERISA for a divorcing spouse to waive his or her right to the other spouse's pension benefits.
- *Crawford v. Metropolitan Government of Nashville and Davidson County*: The Supreme Court will further define the scope of the protection afforded employees by Title VII's prohibition on retaliation.
- *Ysursa v. Pocatello Education Association*: The Supreme Court will consider whether an Idaho statute prohibiting local government employers from allowing payroll deductions for political activities violates the First Amendment free speech rights of unions and their members.
- *14 Penn Plaza LLC v. Pyett*: The Supreme Court will address whether employees covered by a collective bargaining agreement providing that statutory employment discrimination claims must be pursued through the contractual grievance/arbitration procedures have a right for a court to decide their age discrimination claims.
- *AT&T Corporation v. Hulteen*: The Supreme Court will determine whether an employer in calculating retirement benefits must give service credit for pregnancy leaves taken before the Pregnancy Discrimination Act of 1978 amended Title VII where the retirement plan gave full credit for other types of temporary disability leave.

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Wage and Hour

Chinese Restaurant Delivery Drivers Get \$4.6 Million Tip from DOL by [Todd P. Photopoulos](#)

Last month, 36 delivery workers for a Manhattan Chinese Restaurant were awarded between \$100,000 to \$200,000 each by a Federal judge who found that the restaurant refused to pay them minimum wage and overtime. In addition to the huge back pay liability, the family-owned restaurant will also be liable for claims of retaliatory discharge, although the court has yet to determine the amount of relief available for those claims.


At trial, the employees testified to working seven days a week, 13 hours a day, but only being paid about \$1.70 per hour plus tips. While the employer tried to argue that employees had inflated their claims of hours worked, the court quickly rejected that notion based on the employer's own printed schedule of work hours which was consistent with the testimony of the employees. Compounding the employer's problems was the judge's finding that the employer had intentionally destroyed records that would have shown the correct number of hours the employees logged. Because of these findings, the court ruled that it would "infer that the destroyed records would have shown a similar pattern, and indeed that they were likely to have shown still more such activity than the first few preserved records"

The court found that the restaurant acted in "bad faith" and "in knowing violation of the law," thereby warranting liquidated damages in addition to the back wages owed to the employees. The owners of the restaurant still face another trial before the same judge for terminating the group of delivery workers after learning the employees were planning to bring the wage and hour lawsuit and were thinking of unionizing.

In addition to filing the federal lawsuit, the employees also filed a complaint with the National Labor Relations Board, where an administrative law judge with the NLRB has already ruled that the owner must re-hire the fired workers. Needless to say, this family-run business presents a classic example of "what not to do" as an employer. With 36 delivery drivers in the lawsuit, the employer already has a liability in excess of \$4.6 million. The employer has been forced to re-hire all of these understandably disgruntled employees, and still faces additional damages as a result of the pending retaliation trial. [back to top](#) 


Judge Rejects Meat Processing Employees' Wage and Hour Claim

by [Graham W. Askew](#)

A federal judge ruled that two workers at a Mississippi meat processing plant failed to show that they are entitled to additional pay under the Fair Labor Standards Act for their time spent "donning and doffing" protective equipment and related activities. Judge Jon P. McCalla of the United States District Court for the Western District of Tennessee granted summary judgment in favor of Bryan Foods, Inc., in *Sisk v. Sara Lee Corporation*, finding that the belly guards, arm guards, scabbards, knife pouches, cut-resistant gloves, and cut-resistant sleeves used by the plaintiffs to work in the fresh port departments of the plant constituted "clothes" for purposes of Section 203(o) of the FLSA. Section 203(o) of the FLSA excludes from compensable work "any time spent in changing clothes or washing at the beginning or end of each workday" if the time is excluded "by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to a particular employee." In reaching its conclusion, the court relied heavily on two Department of Labor opinion letters issued during the Bush administration that found, in contrast to earlier opinion letters, that donning and doffing protective safety equipment used in the meatpacking industry is not a compensable activity. [back to top](#) 

Maytag Repairmen Settle Wage and Hour Class Action for \$9 Million

by [Todd P. Photopoulos](#)

Wage and hour claims are becoming one of the preferred lawsuits for plaintiffs' lawyers suing employers. The problem for employers is that once they make a wage and hour mistake, they often do so for a broad class of employees and repeat the mistake for a long period of time. This is exactly what Whirlpool discovered when a proposed class action of Whirlpool technicians ("Maytag Repairmen") sued Whirlpool Corporation and its subsidiary Maytag Corporation for refusing to pay for "off the clock" work. Although Whirlpool denied the claim, it agreed to pay \$9,250,000 to settle the claim in order to avoid the burden and expense of continued litigation. The plaintiffs' lawyers for the proposed class of technicians are asking for one-third of that amount, plus \$80,000 in expenses. The claims involved 850 workers from fourteen states alleging that the company did not pay them for time spent driving to customers' homes to make repairs or for mandatory vehicle inventory checks. According to the complaint filed in the Eastern District of New York, the Maytag Repairman was a familiar advertising symbol that helped identify Maytag as "the dependability people." The complaint alleged that Whirlpool benefited from this well-established reputation upon taking over Maytag's service operations. However, the complaint alleged that the company's timekeeping system did not allow the repairmen to clock in until they reached the home of their first customer. [back to top](#) 


Labor Beat

Department of Labor Sues Service Employees

International Union

by [Todd P. Photopoulos](#)


It is not often that the Department of Labor will sue a union. It is the Department of "Labor," after all, not the Department of "Management." However, this is exactly what the DOL has done against the Service Employees International Union ("SEIU") in California, alleging in its federal lawsuit that SEIU Local 6434 violated federal labor law by failing to provide a reasonable opportunity for nomination of candidates in its own election for union officers. Local 6434 of the SEIU represents approximately 160,000 homecare and nursing home workers throughout California. The Local, however, has had its series of controversies in the recent past, including allegations of financial improprieties which resulted in the SEIU placing the Local in trusteeship this summer. Allegations of financial improprieties included claims that the President of the Local, Tyrone Freeman, paid hundreds of thousands of dollars to firms operated by his relatives.

The irony is not lost in the SEIU's failure to fairly conduct its own internal elections. Indeed, the SEIU is at the forefront of Big Labor's attempts to take away employees' right to secret ballot elections in union organizing campaigns. The SEIU put up approximately \$150 million into the recent elections with the hope that the Employee Free Choice Act will be passed. EFCA, which was discussed in the prior edition of Workplace, would eliminate secret ballot elections, a staple part of the U.S. labor laws for over 70 years. [back to top](#) 

Report Finds Increase in Union Mergers Between 1995 and 2007

by [Carlyle C. White](#)

A recent report released by the U.S. Labor Department's Bureau of Labor Statistics found that although the percentage of union workers declined between 1995 and 2007, unions shifted toward a merger strategy to improve bargaining power. The report, titled *Major Union Mergers, Alliances and Disaffiliations, 1995-2007*, found that 31 union mergers occurred during the relevant time period. Out of the 31 mergers, three involved the merger of two or more independent unions, six occurred between independent unions and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and twenty-two were among AFL-CIO affiliates. The leading merger brought the Paper, Allied-Industrial, Chemical, and Energy Workers International Union (PACE) together with the United Steelworkers (USW) to make the USW the largest union in the country, with over 860,000 members.

Conversely, during 1995 to 2007, several unions severed ties with the AFL-CIO. According to the report, the disaffiliations included the International Brotherhood of Teamsters, the United Brotherhood of Carpenters, the Laborers' International Union, the United Food and Commercial Workers, UNITE HERE, the Service Employees International Union and the United Farm Workers. The move toward consolidation of union power will play a strategic role in increased union organizing as unions anticipate the likely passage of the Employee Free Choice Act. [back to top](#) 

Vought Aircraft Machinists Strike in Nashville After Failed Contract Proposal


by [Carlyle C. White](#)

On September 28, 2008, the International Association of Machinists Local 735 ("IAM") went on strike after the union rejected a three-year contract proposal at the Vought Aircraft plant in Nashville, Tennessee. IAM contends that members rejected the proposal largely over seniority and pension provisions in the contract.

The bargaining unit includes 934 employees. Of the approximately 800 members who voted on the proposed contract, 80% voted to reject the

proposal. Following the proposal vote, 94 percent chose to authorize the strike. The main fight seems to be over the employer hoping to get out of participating in the Union's pension plan. An IAM spokesperson stated that the contract proposal contained a provision that would halt the existing defined benefit pension plan for employees with less than sixteen years of seniority and implement a new 401(k) defined contribution plan. Additionally, IAM contended that Vought sought to weaken seniority provisions while increasing employee health care contributions.

Vought officials maintain that a strong proposal was offered that included a competitive package of benefits. A summary of the proposal on the company's website indicates that the contract included general wage increases over a three year period, a \$1.18 cost of living increase, and a \$3,000 ratification bonus. Additionally, Vought stated the proposal improved health care coverage and contained a 401(k) plan with a four percent annual employer match.

The Nashville plant continues to remain open with salaried employees working the production floor while replacement workers are being arranged. Vought expresses its dissatisfaction with IAM's decision to strike while the union has conveyed little willingness to negotiate. [back to top](#) 

FMLA Update

Proposed Legislation Seeks to Expand Coverage and Provide Paid FMLA Leave

by [Carlyle C. White](#)

Recent bills introduced in the U.S. House of Representatives look to expand FMLA coverage and provide paid leave through a trust fund. The Family Leave Insurance Act (H.R. 5873) was introduced on April 22, 2008 and would provide employees with up to 12 weeks of paid leave to care for themselves or close relatives. The Family and Medical Leave Enhancement Act (H.R. 7233), which was introduced on September 29, 2008, seeks to expand coverage of the FMLA to companies with only 25 or more employees. Currently, only employers with 50 or more employees in a 75-mile radius are covered by FMLA leave requirements. Both bills are still being considered by the House.

Family Leave Insurance Act

The Family Leave Insurance Act would provide eligible employees with up to 12 weeks of **paid** leave during any 12 month period to: treat their own serious illness, deal with an emergency caused by military deployment, care for a newborn, care for a new foster or adopted child, or care for a sick family member. A family member is defined as a spouse, child, sibling, domestic partner, parent, grandparent, or grandchild who has a serious medical condition.


The bill would also establish a trust fund called the Family Leave Insurance Fund. Both the employee and employer would contribute premiums of 0.2 percent of the employee's wages. Employers with less than twenty employees would pay a 0.1 percent contribution into the fund. Eligibility to take the paid leave requires the employee to have paid into the fund at least six months and worked a minimum part-time schedule during the preceding six months with the current employer. Self-employed workers could participate by contributing both the employee and employer premiums. Employers could opt out of the paid leave program if they have a plan that provides equal or greater benefits to its employees.

Benefits under the paid leave program would be progressively tiered based on predefined wage levels for employees. An employee earning less than \$30,000 would receive full or nearly full salary, employees making between \$30,000 and \$60,000 would receive a 55 percent wage replacement, and those earning more than \$60,000 would receive 40 to 45 percent of their salary. The bill calls for a five-day waiting period for benefits and a cap of approximately \$800 per week. In addition, benefits would be indexed for inflation and employees would be allowed to use other accumulated leave to

supplement the paid leave benefit.

Similar state government level paid leave benefit programs have been in effect or been introduced in California, Washington, and New Jersey.

Family and Medical Leave Enhancement Act

The Family and Medical Leave Enhancement Act would extend the coverage of the FMLA to employees in small businesses, by mandating that employers with only twenty-five or more employees provide unpaid family and medical leave. The Family and Medical Leave Enhancement Act also seeks to increase leave benefits for eligible employees. The bill would allow parents and grandparents a benefit of up to 24 hours of unpaid leave a year to attend parent-teacher conferences, and to take a child, grandchild, or other family member to the doctor or dentist for regular appointments. The employee, however, is not to exceed four hours of leave during a 30-day period for such purposes. We will of course keep you updated on the status of these and other proposed legislation as the new administration assumes control in 2009. [back to top](#) 

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