

# The ICE age is coming: Make sure you're ready

**M**el Kay Jr., is the president and CEO of Fenceworks Inc., of Riverside, Calif. He, his company and one of his chief corporate officers (who was undergoing chemotherapy), recently settled a federal criminal indictment by pleading guilty to immigration charges of harboring undocumented workers.



In settling the charges, the company paid a fine of \$4.7 million; Kay paid a fine of \$200,000; his fellow officer paid a \$100,000 fine. At a recent conference in Phoenix, Kay confirmed that he still was wearing the ankle bracelet that his sentence required. In addition, all of his federal contracts were voided.

After years of hard work, good business practices and regular savings, Kay became the 2007 poster boy for criminal immigration prosecutions. He had a number of workers that he should have known were undocumented, and he should have had more stringent and organized I-9 practices in place, which verify citizenship or legal status.

However, he was caught between the duty to confirm every employee's identity and work authorization, and the fear of requesting the wrong kind or too much documentation, or improperly refusing to hire a prospective employee and facing a claim of discrimination.

Millions of employers share his confusion and anxiety, and soon it will get worse. ICE, the federal Immigration & Customs Enforcement division, was sued this past August over regulations that govern the duties of employers who receive "No Match" letters from the Social Security Administration.

The judge in the case enjoined the regulations, because ICE failed to follow certain procedural rules. After the injunction was issued, ICE obtained a stay of the proceedings until March 2008, promising to comply with all applicable procedural

rules and re-issue the regulations.

The new regulations are not likely to violate the procedural rules that led to the injunction. Social Security plans to issue the next batch of No Match letters (some 140,000) about the same time as the ICE regulations become final. When the regulations are in force, employers who receive those No Match letters will need to take certain steps to use the "safe harbor" provisions that will protect the employer from an inference that it had constructive knowledge of an employee's undocumented status.

Instead of ignoring those letters as in years past, employers will have to respond, and within set time frames. This obligation may trigger other duties, such as reporting requirements under Sarbanes-Oxley.

Not only will corporate officers have to worry about corporate and personal criminal indictments, they also will have to consider whether to obtain an immigration audit of the company's I-9 records and whether to describe irregularities that the audit turns up in the annual report. Whether the company is publicly or privately held, corporate officers will need to decide what kind of immigration audit they should obtain, and how often.

Mel Kay's indictment and conviction were unfortunate and avoidable. The case also reflects the same rule that IRS follows: where a high-profile defendant is available, pursue it and use it for all possible deterrent effect.

Companies should act now: adopt strict I-9 compliance programs, conduct regular audits (both internal and external), and make every reasonable effort to comply with the new ICE regulations.

In doing so, they and their officers may avoid criminal prosecution altogether. But if not, they at least will have mitigating evidence to present at the time of trial and at sentencing.

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