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LABOR THROUGH CONTRACT THEORY OF SANCTIONS LIABILITY

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As you may be aware, on April 20, 2006, Homeland Security Secretary Michael Chertoff announced a new initiative by the Office of Immigration and Custom Enforcement targeting employers engaged in the use of undocumented workers. On April 19, 2006, ICE raided 26 work sites nationwide operated by IFCO, a German-owned pallet manufacturer pursuant to the Secretary's criminal enforcement powers under the employer sanctions provisions of Immigration and Nationality Act ("INA"). The provision in question makes it a felony to knowingly employ 10 or more undocumented workers in a 12-month period. The Secretary indicated that numerous investigations were under way around the country and that ICE anticipated seeking criminal penalties against individuals and companies engaged in unlawful employment enterprises.

On May 8, 2006, ICE raided several work sites of Fischer Homes, Inc. in Kentucky, arrested 76 undocumented workers, and 4 of Fischer's construction managers and superintendents. The arrests were executed as part of an ongoing immigration and tax investigation, according to the ICE press release. Each of the defendants was charged with aiding and abetting, harboring illegal aliens for commercial or private financial gain. The maximum possible punishment for these charges is up to 10 years imprisonment, $250,000 or both. The press release does not state whether or not the undocumented workers were classified as employees of Fischer Homes, or were subcontractors.

The press release also reports the May 2, 2006 arrest of an Indiana business owner who performed stucco-related services at construction sites in various Midwest states. This individual is charged with money laundering, harboring illegal aliens, transporting illegal aliens, and false statements in connection with an illegal employment schedule. He is said to face as many as 40 years in prison and forfeiture of $1.4 million in his business assets.

Congress is currently debating a substantial revision of our employer sanctions laws. If enacted, employers will be required to participate in electronic verification of all new hires, restrict the types of documents acceptable for verification and identification purposes, investigate all no-match letters received from the Social Security Administration, and retain all documents presented for verification purposes along with the related I-9s for seven years following termination. In addition, the legislative proposal will broaden the definition of illegal harboring to include normal employment, and will heighten the civil and criminal penalties to be imposed for violations.

The foregoing developments indicate that it is prudent for labor-dependent employers, and employers who have grown reliant upon independent contractors to complete substantial work within the core competency of the business, to investigate potential liability under the labor contract provisions of the INA.

A. Can A Contractor Be Liable for Sanctions If Its Subcontractors Are Employing Undocumented Workers?

Simply stated: Yes. The contract is not a boiler plate defense to sanctions liability.

The U.S. Immigration and Nationality Act ("INA") prohibits persons or entities from hiring, recruiting, or referring for a fee, for employment in the United States, an alien knowing the alien is unauthorized with respect to such employment. Although the INA exempts work performed by independent contractors, the question of whether a particular set of workers are independent contractors under the sanctions laws presents a question of fact, resolvable only on a case-by-case basis.

ICE regulations define the term "independent contractor" to include "individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results." The regulation further instructs that whether an individual or entity is an independent contractor will be determined on a case-by-case basis, regardless of what the individual or entity calls itself.

Factors to be considered in that determination include, but are not limited to, whether the individual or entity: supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; 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. This aspect of the regulation is directed at the misclassification of workers as "independent contractors" rather than "employees".

Even if a worker is properly classified as an "independent contractor," that alone does not relieve a person or entity of liability for sanctions violations stemming from the use of such workers, because of the prohibition of the use of labor through contract found in the INA.
INA § 274A(a)(1)(a) makes it a civil violation to enter into a contract or to extend a contract knowing that the contractor has engaged the services of undocumented aliens to provide the contracted for service. The implementing regulations expand upon this language, stating that it is a violation to use any contract, subcontract or exchange to obtain the labor of an undocumented alien knowing that the alien is undocumented. The regulations further state that such conduct is considered to constitute a "knowing hire" for sanctions purposes.

It is important to note that while good faith completion of an I-9 operates as an affirmative faith defense to a claim of knowing hire, that defense is not available for contract labor violations, since the defendant has not I-9'd the subcontractors' workers.

B. What Constitutes a Knowing Hire in the Labor Contract Context?

Under the sanctions laws, ICE defines the term "knowing" to include 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." The regulation goes on to state that "[a]cts of reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf" are included within the scope of the definition of "knowing" for sanctions purposes.

In short, if one or more agents of the company obtains knowledge of facts from which a reasonable person could infer that subcontractor laborers are undocumented, the continued use of that subcontractor to work on company projects could constitute a violation of the knowing hire provisions of the INA. Company agents who have the power to enter into labor subcontracts in the company's behalf are considered to be employers in their own right under the sanctions laws, and can be charged with civil and criminal violations independently of the corporate employer (as happened in the Fischer Homes case). As a general rule, a corporation or principal bears responsibility for the civil and criminal acts of its agents undertaken within the scope of their authority.

The Government relied upon these rules in its criminal sanctions case against Wal-Mart. Therein, the Government alleged that on multiple occasions Wal-Mart's store managers were aware of the undocumented status of the employees of their janitorial subcontractors based upon statements provided by the workers who were arrested in ICE raids on Wal-Mart facilities. The INA makes it a felony to knowingly employ 10 or more undocumented workers in any 12-month period. This provision provided the basis for attacking Wal-Mart and its managers criminally, rather than civilly (a practice Secretary Chertoff endorsed for future sanctions enforcement purposes in his April 20th press conference). Ultimately, Wal-Mart settled the criminal case in 2005 with an $11 million fine, rather than litigate the question of whether higher level management officials were complicit in the unauthorized worker contract scheme.

C. Conclusion and Recommendations For Avoiding Labor Contract Violations

Immigration compliance is shaping up to be the most critical workplace issue of the present time – particularly with respect to employers who operate in plain view (such as building contractors) and utilize foreign workers on their job sites. Because of the heightened public scrutiny, and the desire to avoid shutdowns and interruptions of work, we recommend implementation of the following three-point program:

1. Promulgate a policy prohibiting the use of any labor contractors who employ undocumented workers, subject to disciplinary action up to and including discharge.
2. Train agents with authority to make subcontracting arrangements on their obligations under the sanctions laws, and the possibility of personal civil and criminal liability. Require immediate notification of facts supporting a reasonable belief that certain subcontract workers are not authorized. Training should include an analysis of relevant facts to draw such an inference.
3. Promptly investigate reports of suspected undocumented status among subcontractor laborers. Terminate such subcontractors promptly for failing to comply with your contract policies. We have substantial experience in assisting employers to implement the foregoing recommendations and would be happy to work with you as well. Having completed these steps, we could provide you with an opinion letter affirming our belief in your compliance with the labor contract rules under the sanctions laws.