Repercussions of the Wal-Mart Settlement

An employer’s responsibility for undocumented aliens working for its independent contractors

By David Grunblatt and Leni Battaglia

Wal-Mart Stores, Inc., the world’s largest retailer, agreed to pay $11 million to settle a case in which it was accused of knowingly using hundreds of undocumented workers hired by contractors to clean its stores. In addition, 12 contractors that provided janitorial services to Wal-Mart will pay an additional $4 million in fines and plead guilty to criminal immigration charges.

The payment represents a landmark dollar amount for a civil immigration settlement. The settlement also marks a shift from prior enforcement actions in that Wal-Mart is required to create an internal program to ensure future compliance with immigration laws by both itself and its contractors. Michael Garcia, Assistant Secretary of the Immigration and Customs Enforcement (ICE) — which has jurisdiction over enforcement of immigration laws — stated that "ICE is committed to not only bringing charges against companies that violate our nation’s immigration laws, but also working with them to ensure that they have programs in place to prevent future violations.”

Employer Sanctions

The Immigration Reform and Control Act of 1986 (IRCA), codified in the Immigration and Nationality Act (INA), creates the legal framework for prohibiting employment of illegal aliens. It includes both civil and criminal sanctions against employers and an employment verification system. Employers must execute an Employment Verification Form (Form I-9) for each employee it hires in the United States, establishing that employee’s eligibility to work. The IRCA imposes penalties on employers who knowingly hire or continue to employ aliens unauthorized for employment in the United States. According to federal officials, the $11 million civil settlement and $4 million criminal forfeiture in the Wal-Mart case constitute the two most significant enforcement actions taken by the U.S. in the field of immigration employment sanctions since the enactment of IRCA. The settlement against Wal-Mart alone is four times larger than any other single payment received by the government in an illegal alien employment case.

The INA makes it illegal to hire or recruit aliens for employment knowing they are unauthorized for employment in the U.S. The term “knowing” includes not only actual knowledge, but also knowledge that may be fairly inferred through facts and circumstances which would lead a person, through the exercise of reasonable care, to know. Constructive knowledge may be inferred where the employer fails to properly complete the I-9 Forms or has information available to it that would indicate the foreign national is not authorized for employment. Employers are also prohibited from contracting or subcontracting for the employment of a foreign national knowing that the foreign national is not authorized for employment. Employers who know or should have known that an alien is not authorized to work in the U.S. may be subject to civil and criminal penalties.

Prior to the Wal-Mart case, employers were inclined to interpret this provision to allow for a certain amount of willful blindness, whereby employers would not make a serious attempt to ascertain the visa status of the employees of subcontractors, or would seek to protect themselves from liability by soliciting a signed affirmation from the subcontractors that they were in compliance with U.S. Immigration and Nationality law.

Worksite Investigation

The recent civil settlements and criminal pleas arise out of a nationwide investigation conducted into the employment of illegal aliens by independent contractors — hired by Wal-Mart — to provide contracted janitorial services. In two separate investigations from 1998 to 2003, authorities arrested 352 illegal immigrants contracted as janitors at Wal-Mart stores. According to attorneys for the immigrants, many of the employees worked seven days or nights a week without overtime pay or injury compensation. Wiretaps used during the investigation revealed Wal-Mart executives had knowledge that the subcontractors used illegal workers.

The settlement agreement directs Wal-Mart to make payment of $11 million to the U.S. Attorney’s Office for promoting future law enforcement programs and activities by ICE. In addition, the settlement permanently enjoins Wal-Mart from knowingly hiring, recruiting, and continuing to employ aliens not authorized to work in the U.S. Wal-Mart has agreed also to provide store managers with training regarding their legal obligations to prevent the knowing hiring, recruitment or employment of unauthorized aliens. Furthermore, Wal-Mart has also agreed to comply and cooperate truthfully with any
investigation into the employment practices of independent contractors.

The settlement agreement represents a significant break from past immigration business practice in that it also requires Wal-Mart to establish a compliance program to verify that all independent contractors are taking reasonable steps to comply with immigration laws in their employment practices. Employers have traditionally assumed little to no responsibility over the hiring practices of independent contractors, this despite the existing employer sanctions for knowingly subcontracting work to unauthorized aliens.

Wal-Mart spokeswoman Mona Williams stated that the company was “ready to put it behind us and move forward.” Although the company denied any wrongdoing, Ms. Williams stated, “We acknowledge that we should have had better safeguards in place to ensure our contractors were hiring only legal workers — that’s why we’re agreeing to pay the $11 million.” Ms. Williams further stated, “It is a lot of money, but I think that is because it is designed to get attention and remind businesses everywhere that they have a duty to ensure their outside contractors are following federal immigration laws.” According to the settlement, Wal-Mart was spared of any criminal charges, although the subcontractors involved in the investigation will plead guilty to criminal charges.

Sanctions After Wal-Mart

The Wal-Mart settlement shifts the employment-verification paradigm. Ignorance is no longer bliss, and it is no longer folly to be wise. Although one could argue that the Wal-Mart case presented a special circumstance, since the alleged abuse of workers and the widespread and blatant disregard of U.S. immigration law put Wal-Mart in a position where they had to mitigate the damage by executing such an agreement, it still remains a fact that the principle of greater responsibility on the part of the employer has been established. Federal authorities made clear with this settlement that companies can no longer subcontract corporate liability and that they will be held responsible for the immigration law violations of their subcontractors.

Although the Wal-Mart case involved the subcontracted employment of manual workers — evoking concern regarding the abuse of foreign workers who were undocumented aliens — the case also has implications for the subcontracting of professional workers. The Department of Labor and the Department of Homeland Security are acutely concerned about the employment of foreign nationals in professional jobs that U.S. citizens might be available for and would be willing to take. Regardless of the nature of the employment, the size and scope of the perceived violation will likely bear a direct correlation to the nature and aggressiveness of the investigation and the level of responsibility and liability that will be attributed to the employer.

Recommendations

Employers need to be more vigilant about complying with immigration laws that govern both their employees and those employed by subcontractors. They should carefully examine their relationship with subcontractors and, at a minimum, should contractually require subcontractors to comply with all immigration and employment verification laws. However, where there is extensive use of foreign nationals, this may not be enough. Taking a lesson from Wal-Mart, it might be appropriate to “have programs in place to prevent...violations.” Employers will have to decide how involved they want to be in the compliance process of their subcontractors. This might include agreements to allow for audit or supervision of the I-9 Forms of subcontractors, or to mandate periodic reports from the subcontractors as to the status of their non-U.S. employees.

Employers should also provide training to ensure that company managers are properly educated as to immigration laws governing both their own employees and those employed by subcontractors. Managers should also be trained to take immediate action upon receiving reports of invalid documentation, fraud, or suspicions of unlawful employment.

Employers should be mindful, however, not to go overboard in terms of employment verification vigilance. Employers risk running afoul of antidiscrimination and document abuse legislation by holding suspected foreign workers to more stringent standards.

Looking beyond Wal-Mart, the trend appears to continue to make employers responsible for enforcing U.S. immigration law. Currently before the U.S. Supreme Court is a ruling by the 11th Circuit in *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005), that a corporation and its suppliers of temporary workers can constitute an “enterprise” for purposes of liability under RICO. If the Supreme Court upholds the decision, businesses that rely on temporary workers may very well be vulnerable to liability under RICO for the employment of undocumented aliens.