MEMORANDUM

TO: Joel Nelsen, President
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RE: AB 450 Implementation and Impacts

I. Introduction.

On October 5, 2017, Governor Brown signed AB 450 (Chiu). Beginning January 1, 2018, it imposes new requirements on California employers during immigration worksite enforcement actions conducted by Immigrations and Customs (ICE).

The most significant impact of AB 450 is that it eliminates the ability of an employer under federal law to voluntarily consent to ICE access to the worksite.

Employers need to be aware of AB 450 to ensure they are prepared when immigration enforcement agents arrive at the workplace and avoid falling into potential liability pitfalls.

II. Employer Requirements under AB 450.

1. Employers cannot allow immigration enforcement agents access to any nonpublic areas of a workplace without a judicial warrant.

AB 450 prohibits an employer or any other person acting on the employer's behalf from providing voluntary consent to an immigration enforcement agent to enter nonpublic areas of a place of labor unless the agent provides a judicial warrant. An employer, however, may permit an immigration enforcement agent to enter a nonpublic area where employees are not present for the purpose of verifying whether the agent has a judicial warrant.

An employer in violation of this requirement is subject to a civil penalty of $2,000 to $5,000 for the first violation and $5,000 to $10,000 for each subsequent violation. If a court finds the immigration enforcement agent was permitted to enter a nonpublic area of a place of labor without consent of the employer or other person in control of the place of labor, the civil penalty does not apply.

Employers will need to be mindful of the specifics of a judicial warrant and the differences between a judicial warrant, administrative warrant and subpoena.

- A judicial warrant is an official court document, usually with the designation of a specific court, and it is signed by a judge.
- An administrative warrant is a document signed by an ICE agent, stating that a person is being designated for possible arrest and possible deportation proceedings. An administrative warrant is not signed by a judge.

- A subpoena presented by federal immigration agents will be issued by the Department of Homeland Security and will request the production of employee records, including original I-9 forms and identification documents provided by employees during the hiring process.

2. Employers cannot allow immigration enforcement agents to access, review or obtain employee records without a subpoena or judicial warrant.

AB 450 prohibits employers from allowing immigration enforcement agents to access, review or obtain the employer's employee records without a subpoena or judicial warrant. The only exception to this requirement is for the I-9 Employment Eligibility Verification Form (I-9 Form) and other documents for which a Notice of Inspection (NOI) has been provided to the employer. A NOI for inspection of I-9 Forms may be accompanied by a subpoena or a warrant, but neither is required by law.

An employer in violation of these requirements is subject to a civil penalty of $2,000 to $5,000 for the first violation and $5,000 to $10,000 for each subsequent violation. If a court finds the immigration enforcement agent was permitted to access, review or obtain the employer's employee records without consent of the employer or other person in control of the place of labor, the civil penalty does not apply.

The administrative inspection process is initiated by the service of a NOI upon an employer compelling the production of I-9 Forms. By law, employers are provided with at least three business days to produce the I-9 Forms. Often, immigration enforcement agents will request the employer provide supporting documentation, which may include a copy of the payroll, list of current employees, Articles of Incorporation, and business licenses.

3. Employers must provide notice to employees and their authorized representative of certain immigration enforcement actions.

AB 450 requires an employer implement the following procedures within 72 hours of the employer receiving a NOI for I-9 Forms or other employment records by an immigration agency:

- Employers must post a notice at the worksite in the language the employer normally uses to communicate employment-related information to employees containing the following information:
    - An immigration agency, identified by name, has issued an NOI and will conduct inspections of I-9 forms or other employment records.
    - The date that the employer received the NOI.
    - The "nature of the inspection" to the extent known.
- Employers must provide the same notification to the employee's authorized representative, namely the employee's collective bargaining representative, if any, within 72 hours of the immigration agency's issuance of an NOI.
- The employer must, upon reasonable request, provide an affected employee a copy of the NOI for the I-9 Forms.

AB 450 requires the Labor Commissioner to develop a template employers may use to comply with this notification requirement by July 1, 2018. Until that time, employers will need to develop their own posting.

Within 72 hours of the employer's receipt of a written immigration agency notice informing the employer of the results of the agency's inspection of the I-9 Forms and the employer's employment records, the employer must provide a written notice to any affected employees, and the employees' collective bargaining representative, of the obligations of the employer and the affected employees, with the following information:

- A description of any and all deficiencies or other items identified in the written immigration inspection results notice related to the affected employee.
- The time period for correcting any potential deficiencies identified by the immigration agency.
- The time and date of any meeting with the employer to correct any identified deficiencies.
- Notice that the employee has the right to representation during any meeting scheduled with the employer.

An "affected employee" is an employee who may lack work authorization or an employee whose work authorization documents have been identified as deficient by the immigration agency during the inspection.

An employer who fails to provide the notice or notices required by AB 450 is subject to a civil penalty of $2,000 to $5,000 for the first violation and $5,000 to $10,000 for each subsequent violation.

4. Employers cannot reverify employment eligibility of a current employee at a time or manner not required by federal law.

AB 450 prohibits employers from reverifying employment eligibility of a current employee at a time or in a manner not required by the employment eligibility verification provisions of the Immigration Reform and Control Act of 1986, 8 USC § 1324a(b), or that would violate any E-Verify Memorandum of Understanding the employer has entered into with the Department of Homeland Security. This includes a prohibition on voluntary self-audits.

An employer that violates this provision through an unlawful reverification is subject to a civil penalty of up to $10,000.

III. Enforcement and Liability Pitfalls.

1. Definition of immigration enforcement agent.

AB 450 does not define the term "immigration enforcement agent." The general assumption is that the term refers to officers of ICE and to Homeland Security investigations. However, this characterization could also extend to federal officials performing immigration functions under the Department of Homeland Security, Department of Labor or State Department.

The employer should be cautious and seek legal advice any time a federal officer asserting immigration enforcement authority comes to the employer's place of business requesting access to the workplace or to employee records.

2. Voluntary audits.

The Department of Justice and Department of Homeland Security encourage employers to voluntarily conduct internal immigration-compliance audits, correct I-9 paperwork errors, and reasonably investigate circumstances suggesting that an employee may lack employment authorization. AB 450

limits the employer's ability to do this and places the employer in a difficult position if the employer has reason to believe there is a discrepancy in I-9 Forms.

Under the constructive-knowledge rule, an employer will be deemed to know whatever could have been discovered if a reasonable investigation had been conducted. Thus, if an employer declines to investigate suspicious circumstances suggesting unauthorized employment, ICE can maintain that an employer has violated federal law because company officials should have known that the business had hired or continued to employ a worker while aware that the individual had no right to be employed in the United States. This leaves the employer with the decision of whether to abide by state or federal law.

To avoid this situation to the greatest extent possible, employers should ensure in the initial hiring process the employee and employer properly fill out the I-9 form and the employer examines the employee's eligibility and identification documents to determine whether the documents "reasonably appear to be genuine." If proper procedure is followed, the employer will have complied with federal and state law. If later an employee provides the employer documentation that is evidence of unauthorized employment, the employer will need to act in compliance with federal law, which should still be in compliance with AB 450 as verifying authorization documents at that point would not be considered a voluntary audit or discriminatory.

3. Access to nonpublic areas of the place of labor.

AB 450 places an extra burden on employers attempting to restrict access of an immigration enforcement agent to an agricultural field. Under current law, an immigration enforcement agent may not enter into the nonpublic areas of a business or a farm or other outdoor agricultural operation for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States, *unless the officer has either a warrant or the consent of the owner*. (8 U.S.C. Sec. 1357(e) (*emphasis added)*.) AB 450 removes the property owner's ability to consent to the immigration enforcement agent entering his or her property, if the property owner is also the employer, and additionally places a burden on the employer to prove an immigration enforcement agent, without a warrant, entered the property without the employer's consent if they find immigration enforcement agents on the property.

It is important to note that under federal law neither a farm labor contractor nor a person acting on the employer's behalf can consent to an immigration enforcement agent entering a farm or agricultural field. Farm labor contractors and farm managers or supervisors should be given the contact information of the property owner so that if immigration enforcement agents come to an agricultural field, the agents can be directed to the owner.

Federal law also allows federal immigration agents to enter a nonpublic area of business without consent or a search warrant if: (i) the area is within 25 miles of the U.S. border; (ii) the agents are in "hot pursuit" of an illegal immigrant; or (iii) the property is not being used for agricultural purposes. AB 450 does not address these exigent circumstances, so it is unclear how they will be handled after the law goes into effect. It can be assumed however, if immigration agents are entering the property under one of these circumstances, it will be without the employer's consent and enforcement by the Labor Commissioner will be avoided.

If an employer, or other person acting on the employer's behalf, sees an immigration enforcement agent on the property without consent, the employer should call his or her attorney and document the incident in detail. If an action is filed by the Labor Commissioner or Attorney General against the employer, the employer will need to prove in court the immigration enforcement agent entered the property without voluntary consent.

4. Definition of other person acting on the employer's behalf.

AB 450 does not define "other person acting on the employer's behalf." In the legislative committee analysis, this term was described as a "person in charge of the workplace" and "supervisors and managers." This removes employees without managerial authority from the definition, but the law is murky.

As stated above, neither a farm labor contractor nor a supervisor or manager can allow immigration enforcement agents on a farm or outdoor agricultural property without a warrant or consent of the owner. Supervisors and managers must be trained in how to handle this situation to ensure the Labor Commissioner or Attorney General does not pursue action against the employer should a supervisor or manager allow immigration enforcement agents on the property without a warrant. If contracting with a farm labor contractor, it should be ensured the farm labor contractor understands his or her obligations under AB 450.

IV. Compliance.

There are still questions as to how AB 450 will be implemented and how federal immigration agents will react to the new California requirements. Employers should implement the following procedures to ensure they are prepared and can avoid any unnecessary agitation of federal or state agents.

Steps to take before January 1, 2018:

- Employers need to train all staff that would be encountering the situations raised by AB 450.
    - Managers and supervisors must be trained to require federal immigration agents to produce a judicial warrant before entering the nonpublic area of the workplace.
        - A nonpublic area away from employees should be identified as the location the managers and supervisors may take immigration enforcement agents to verify whether the agent has a judicial warrant.
    - Front-line employees, such as receptionists, should be trained to require immigration agents to wait in the reception area while they call the employer or supervisor or manager instead of allowing the agents access to the nonpublic areas of the workplace.
    - Managers and supervisors must be trained to require a subpoena or court order before providing consent to an immigration agent to access, review or obtain the employer's employee records.
        - The employer should provide examples of these documents in training.
- A template should be developed to provide the notice required by AB 450 when the employer receives a Notice of Inspection from immigration agents to inspect I-9 Forms and other employment records. The template may need to be in several languages depending on how the employer normally communicates with the employees.

    - Managers and supervisors should be trained on how to complete the notification forms; where to post the notification; and the time period in which the notification must be posted.
    - Once the Labor Commissioner develops a template for notification, the employer should adopt that form.
- Employees handling employee records, such as human resources staff, should be advised not to reverify the work eligibility of any current employees unless required by federal or state law.
- Employers should enter into a written agreement with any farm labor contractors employed verifying they understand the requirements of AB 450 and will not consent to immigration authorities entering a nonpublic work area without a judicial warrant and should direct immigration authorities to the owner of the property.

What to do when immigration agents want to conduct an audit:

- Confirm the identity of the agents by asking for their business cards and calling the agency.
    - Managers, supervisors and front-line staff should be trained in this procedure.
- An audit, including an audit of I-9 Forms, requires three days advance notice in writing. Do not provide immigration agents consent to access, review or obtain employment records without the required documentation.
    - For most employee records, a subpoena or judicial warrant is required.
    - For an audit of I-9 Forms, only a Notice of Intent is required.
- If immigration officials provide a Notice of Intent to conduct an audit of I-9 Forms, the employer must post a notice for employees and provide notice to employees' collective bargaining representative within 72 hours or receipt of the notice, that includes:
    - The name of the immigration agency conducting the inspection;
    - The date the employer received notice of the inspection;
    - The nature of the inspection to the extent known;
    - A copy of the Notice of Inspection of I-9 Forms to be inspected.
- If, after the inspection, the immigration agency provides notice to the employer that it has identified a deficiency in the work authorization documents of an employee, the employer must notify the affected employee and the affected employee's collective bargaining representative of the notification within 72 hours of the receipt of the notice.
    - The notice must contain:
        - A description of any deficiencies or other items in the inspection results related to the affected employee;
        - The time period for correcting any potential deficiencies identified by the immigration agency;
        - The time and date of any meeting with the employer to correct the identified deficiencies; and
        - Notice that the employee has the right to representation during any meeting scheduled with the employer.
    - It is the employer's responsibility to provide notice to an affected employee and the employee's authorized representative, however, the employer should identify mangers or supervisors that can provide this notice should the employer be unable to do so within the specified time period.

- **During an audit, produce only the forms requested.**
    - **If the audit is of I-9 Forms, only produce the I-9 Forms.**
    - **If the audit is broader, only produce the items requested in a valid subpoena.**
- **Sequester the immigration agents during the audit to limit their access to your business and employees.**

<u>What to do when ICE wants to conduct a raid</u>:

- Confirm the identity of the agents by asking for their business cards and calling the agency.
    - Managers, supervisors and front-line staff should be trained in this procedure.
- The employer, managers, supervisors, and farm labor contractors must require immigration agents to present a valid judicial warrant before entering a nonpublic work area.
    - If possible, identify a location to take immigration agents for the purpose of verifying the judicial warrant.
- No advance notice is required for a raid. If immigration agents enter a nonpublic workplace without consent, an attorney should be consulted and the incident should be documented in detail.
- If presented with a judicial warrant, review the warrant to determine its scope.
    - The warrant will identify the location to be searched and the items and/or individuals to be seized.
- Accompany the immigration agents on their search and document everything that occurs.
- Consult your attorney before giving immigration agents access to employees or management.

CONCLUSION

AB 450 places additional burdens on employers and is far from clear. Employers should implement training procedures on the new law now and err on the side of caution when determining the scope of the new requirements.

Employers are encouraged to consult with their attorney any time immigration agents show up at the workplace and remember they are not required to answer questions from immigration agents and have the right to continue business operations during an immigration agent visit.