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LLP

## New Rules and Notice Requirements for California Employers if Federal Immigration Authorities Visit the Worksite

Immigration is a legislative priority in California where the legislature has enacted a number of immigration laws with employment implications since 2013 (e.g., AB 263/SB 666 [prohibiting retaliation for immigration-related practices]; AB 1660 [prohibiting discrimination because of drivers licenses issued to undocumented workers]; AB 622 [enacting a \$10,000 penalty for E-verify violations]; and SB 1001 [adding Labor Code section 1019.1 expanding protections against unfair immigration-related practices].)

Continuing this trend, Governor Brown has signed a new wide-ranging law (AB 450) which highlights the current tension between California and the federal government related to immigration. Amongst other things, this new law limits the ability of California employers to voluntarily provide worksite access to federal immigration authorities, imposes new notice requirements, and enacts many new statutory penalties.

Here is a summary of the key changes and some steps employers may wish to take to ensure compliance with the new law, which takes effect January 1, 2018.

### New Limits on Immigration Agency Access

While federal law presently allows federal immigration agencies access to non-public portions of an employer either through a warrant or the employer's consent, this new law removes the employer's ability to provide consent; instead employers must require a warrant or subpoena depending on the nature of the information sought. Accordingly, new Government Code section 7285.1 prohibits, "except as otherwise required by federal law," private or public employers or their agents from providing voluntary consent to an immigration enforcement agent access to enter nonpublic areas of a place of labor without being provided a judicial warrant. However, this section does not prohibit employers or their agents from taking immigration enforcement agents to a nonpublic area, where employees are not present, for purposes of verifying whether the federal government immigration enforcement agent has a judicial warrant, provided the employer does not provide consent to search nonpublic areas in the process.

Similarly, new Government Code section 7285.2 prohibits, "except as otherwise required by federal law," a private or public employer or its agents from providing voluntary consent to an immigration enforcement agent to access, review or obtain the employer's employee records without a subpoena or judicial warrant. This section also permits the employer or its agent to challenge the subpoena's validity in a federal district court. However, section 7285.2 does not apply to I-9 Employment Eligibility Verification forms if the employer has been provided a Notice of Inspection.

Both new sections authorize the California Labor Commissioner to recover civil penalties ranging from \$2,000 to \$5,000 for a first violation, and \$5,000 up to \$10,000 for each subsequent violation. For both sections, the penalties do not apply if the immigration enforcement agent obtained otherwise unauthorized access without the consent of the employer or the person in control of the place of labor. For purposes of assessing the penalties under both sections, “violation” means each incident when it is found a violation occurred without regard to the number of employees, the number of immigration enforcement agents involved in the incident, or the number of locations affected or employment records accessed/reviewed/obtained in a day.

For both sections, the Labor Commissioner or the California Attorney General will have the exclusive authority to enforce through a civil action, and any penalties recovered shall be deposited in the Labor Enforcement and Compliance Fund.

## New Notice Obligations for Employers

The new law also requires employers to provide various notices related to immigration enforcement activity in the workplace. For instance, new Labor Code section 90.2 requires employers that receive a Notice of Inspection of I-9 records or other employment records by an immigration agency to post notice of this impending inspection. This notice would need to be posted within 72 hours of receiving notice of the inspection in the language the employer normally uses to communicate employment-related information to employees. This notice would need to include: (1) the name of the immigration agency conducting the inspection; (2) the date the employer received notice; (3) the nature of the inspection, if known; and (4) a copy of the Notice of Inspection of I-9 Employment Eligibility Verification Forms for the inspection to be conducted.

Notably, the Labor Commissioner will be required by July 1, 2018 to develop and publish on its website a template posting that employers may use to inform employees regarding an impending inspection by a federal immigration agency of I-9 forms or other employment records. Notably also, while earlier versions of AB 450 required the employer to affirmatively deliver written notice to each employee, it now only requires that the notice be posted although employers would also need to provide, upon reasonable request to an affected employee, a copy of the Notice of Inspection of I-9 Employment Eligibility Verification Forms.

Once again except as required by federal law, employers may also have notice obligations after the inspection is concluded. Within 72 hours of receiving notice regarding the results of the records inspection, the employer must provide to each current “affected employee,” and to their “authorized representative,” a copy of the written immigration agency notice that provides the results of the inspection of I-9 Employment Eligibility Verification forms or other employment records.

Within this same 72-hour period, the employer must also provide to the “affected employee” and their “authorized representative” written notice of the employer’s and affected employee’s obligations arising from the results of this inspection. This notice shall relate to the affected employee only and must be hand-delivered at the workplace if possible, and if not, by mail and email, if the employer knows the employee’s email address, and to the employee’s authorized representative. This notice must contain the following information: (1) a description of all deficiencies or other items identified in the written immigration inspection results notice related to the affected employee; (2) the time period for correcting

any potential deficiencies identified; (3) the date/time of any meetings with the employer to correct the deficiencies; and (4) the employee's right to be represented during this meeting.

For purposes of this section, an "affected employee" would mean an employee identified during the immigration agency inspection as either lacking work authorization or whose work authorization documents have been identified as being deficient. An "authorized representative" would mean an exclusive collective bargaining representative.

As with Government Code sections 7285.1 and 7285.2, employers who fail to provide the notices required under section 90.2 are subject to civil penalties payable to the Labor Commissioner ranging from \$2,000 to \$5,000 for the first violation, and from \$5,000 to \$10,000 for each subsequent violation. However, unlike the statutory penalties in proposed new Labor Code sections 90.1 and 90.2 against employers who provide improper access, these statutory penalties may not be required if the federal agency had specifically directed the employer not to provide notice to an affected employee.

Notably, while earlier versions of AB 450 also required the employer to provide advance notice of inspection to the Labor Commissioner, these requirements have been deleted by amendment.

## Prohibition on Unauthorized Re-Verifying of Current Employees

In 2016, the Legislature enacted SB 1001 and new Labor Code section 1019.1 prohibiting employers from engaging in various actions while determining the employment eligibility of an applicant or employee (e.g., refusing documents that appear reasonably genuine, requiring more or different documents, etc.). AB 450 enacts new Labor Code section 1019.2 to prohibit employers or their agents from re-verifying the employment eligibility of a current employee at a time or in a manner not required under federal law. As with section 1019.1, new section 1019.2 authorizes the Labor Commissioner to recover civil penalties up to \$10,000. However, it also provides that an employer's actions that violate new section 1019.2 cannot also form the basis for liability or a penalty under current section 1019.1.

Perhaps anticipating future legal challenges, AB 450 provides its provisions are severable so that if any particular provision were invalidated, the remainder will remain in effect.

Similarly, in an effort to prevent conflict with federal law, new Government Code section 7285.3 and subsection (f) in new Labor Code section 90.2 and subsection (c) in new Labor Code section 1019.2 clarify that these new provisions shall not restrict or limit an employer's compliance with a memorandum of understanding governing the use of the federal E-Verify system.

## What Does This Mean for Employers?

To comply with these new provisions, employers should consider the following steps:

- Ensure those individuals likely to interface with federal immigration authorities arriving at the worksite are aware of these new limitations on access, including that they cannot simply consent to agency access and must require particular documents (e.g., a warrant, a

- subpoena or a Notice of Inspection);
- Understand and comply with new posting and notice obligations, both before and after an inspection. Given the short turnaround time of only 72 hours, employers should standardize these procedures and consider developing or obtaining templates they can use. Employers may also consider obtaining the template notice the Labor Commissioner is scheduled to provide by July 1, 2018;
  - Remind supervisors about the prohibition on re-verifying current employees work eligibility unless required by federal law.

The complete text for AB 450 is available at:

[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB450](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB450)

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