Best Practices to Avoid General Contractor Liability for Immigration Violations by Subcontractors

The Immigration Reform and Control Act of 1986 ("IRCA") sought to curb illegal immigration by removing the "magnet" of unauthorized labor. To do this, IRCA required all U.S. employers to, essentially, police their own workforce in order to assure that their employees are authorized to work. IRCA makes it illegal for any U.S. employer to hire, recruit or refer for a fee an individual known to be unauthorized to work; continue to employ an individual known to be unauthorized; and/or hire, recruit or refer for a fee any person (citizen or alien) without following the act's recordkeeping requirements. The recordkeeping requirement centers on the completion of Form I-9 by the employee (Section 1) and employer (Section 2) within the first three days after an employee begins work. It further requires employers to maintain records relating to the Form I-9 employment eligibility verification process and to avoid discrimination against applicants and employees on the basis of national origin or citizenship throughout the process.

U.S. Immigration and Customs Enforcement ("ICE") is tasked with enforcing IRCA through worksite investigations. An employer facing an investigation could be subject to various civil and/or criminal penalties, depending on the extent of the violation. Examples of civil penalties include cease and desist orders, fines and seizure of assets. Fines for technical (*i.e.*, paperwork) violations range from $230 to $2,292 *per violation*. Fines for knowingly[1] hiring or continuing to employ individuals without work authorization range from $573 to $20,130 *per violation*. These penalties can be further aggravated (*i.e.*, increased) or mitigated (*i.e.*, decreased) depending on certain factors, such as the size of a business, good faith, and a history of prior violations, among others. Criminal penalties include, by way of example, charges of alien smuggling or transport, shielding an illegal alien from detection, encouraging or inducing an illegal alien to enter the U.S., or felony charges for knowingly hiring or continuing the employment of undocumented workers. Importantly for general contractors ("GCs"), certain serious violations can lead to debarment by ICE, meaning an employer will be prevented from participating in future federal contracts and receiving certain benefits from the federal government. For GCs that rely heavily on large government contracts, debarment can be a death sentence.

Given the severity of these penalties, it should come as no surprise that GCs generally take their IRCA responsibilities very seriously. These responsibilities include:

1. Creating, disseminating, and maintaining comprehensive I-9 and E-Verify policies and procedures.
2. Limiting the number of employees who handle I-9 compliance, and periodically training this "I-9 team" on issues relating to compliance.
3. Conducting periodic self-audits of their I-9 records to correct mistakes and use the corrections as a training tool to help the I-9 team avoid repeating errors on future forms.

[1] Knowing violations may include actual knowledge that someone is unauthorized to work in the U.S.; however, pervasive and repeated failures to complete the Form I-9 process can also evidence that an employer has constructive knowledge – *i.e.*, the implication that a contractor was aware of employment authorization issues and deliberately or recklessly chose to ignore them. Conversely, a contractor who properly completes the Form I-9 has a good-faith compliance defense to any accusation of a knowing violation. Employers need not be document examiners; so long as the Form I-9 is completed correctly, within the correct timeframe, and the documents provided appear "valid on their face" (meaning no obvious indicia of inauthenticity), an employer can rely on the I-9 process for safe harbor. The good faith defense is lost, however, if the employer is "on notice" that an employee is not authorized to work.

4. Making sure their subcontractor agreements have appropriate language to assure subcontractor compliance, shielding the GC from liability for subcontractor violations and giving the GC the right to terminate the contract in the event noncompliance is brought to light.
5. Developing a Raid Action Plan for use if ICE executes a workplace investigation at the project site, and training key employees on how to handle that situation.
6. Using the electronic "smart" Form I-9, which reduces the potential for mistakes, and instructing the I-9 team to provide employees with the requisite information to fill out their portion of the form, but not to be so involved as to become a preparer of the form.
7. Warning the I-9 team of the dangers of overdocumentation and reminding them that IRCA also contains antidiscrimination provisions.

These are best practices that all employers should have in place to avoid exposure to penalties and to mitigate same should a workplace investigation occur. A GC utilizing these best practices can feel confident that it is limiting exposure for *its* employment verification violations, but what if a subcontractor does not have the same level of respect for IRCA's mandates? IRCA only applies to the employees of an employer and does not extend to employees of independent contractors. Put another way, a GC has no responsibility to verify the employment authorizations of independent contractors, including employees of subcontractors. However, there are several corollaries to this general rule. A GC should not use a subcontractor specifically for the purpose of hiring unauthorized workers that its company would not hire for fear of liability and penalties. An employer also cannot avoid liability by misclassifying an employee as an independent contractor in order to except that true employee from the employment authorization verification process.

The golden rule is that a GC should not inject itself into the employment authorization verification process of a subcontractor whenever possible. If a GC exercises too much control over a subcontractor's Form I-9 or human resource processes, it can expose itself to liability as a joint or co-employer of the subcontractor's employees. That being said, a GC cannot bury its head in the sand and deliberately ignore certain, obvious red flags, or "triggers," that require affirmative action. These competing concerns require a GC to carefully balance between receiving too much and too little information from their subcontractors.

A general contractor's number one priority is avoiding the appearance of a co-employment situation, which can create exposure under various laws, one of which being IRCA. The goal is to always maintain formal boundaries to the contractual relationship, referred to being "at arm's length." Recall, GCs are not required to verify employment authorizations for the employees of subcontractors. Thus, GCs should not attempt to control the I-9 or E-Verify processes of a subcontractor. To the extent the GC controls the process, ICE could find a direct employer-employee or co-employment relationship to the subcontractor's employees, inviting joint and several liability to the GC for any violations of the subcontractor. All human resource functions (*e.g.*, payroll, benefits, policies, *etc*.) should be separate. GCs and subcontractors should also not share employees. If a general contractor wants to hire an employee of the subcontractor, that worker should be treated as if they are a new applicant for employment, even if they have been working at the project site for multiple years. The worker should fill out an application, be interviewed and orientated, and have a new Form I-9 completed on behalf of the GC.

GCs should have strong contractual provisions in their subcontractor agreements. These provisions should: (a) require subcontractor compliance with IRCA and E-Verify (if applicable); (b) state that each request for payment constitutes a warranty of compliance with those laws; (c) reserve the right to demand proof of compliance; and (d) obtain defense and indemnity from the subcontractor for any immigration violations. The GC should not, however, require its review of the subcontractor's I-9 and E-Verify records. Review of subcontractor records could raise the same unhealthy employer-employee and co-employment issues that we're seeking to avoid.

From the folder marked "obvious," a GC should not contract with any subcontractor that has a bad reputation or a history of immigration violations. Carefully vet subcontractors with a short existence to make sure they can be trusted; subcontractors with a larger portfolio without notable incidents are likely to garner more trust. Never move employees you know are unauthorized to work to a subcontractor in order to avoid liability. This blurs the lines between your entities and clearly shows you, as the GC, *knew* continued employment of this individual or individuals was an issue.

While the golden rule is not to assert control over the subcontractor's Form I-9 and E-Verify processes, certain triggers require a general contractor to take affirmative action. These include: (a) a credible tip that calls into question the work authorization of a specific employee; (b) a credible tip that a subcontractor is employing illegal immigrants; (c) an employee requests "sponsorship" for a work visa; (d) accusations of identity theft relating to a worker; or (e) an ICE worksite investigation into the subcontractor or worksite.

If any of these events occur, a GC should first contact its immigration counsel to put a plan together. It should also immediately consult its subcontractor agreement to assure that the document provides indemnity and defense to the GC in the event of any immigration audits or violations. If it does not, it would be prudent to execute an addendum regarding same as soon as possible. It is also appropriate, at this point, to request the subcontractor's I-9 and E-Verify policies and procedures. Employers who utilize the best practices outlined above – such as having properly updated and disseminated policies and procedures, conducting periodic self-audits and trainings – are deserving of more trust. If you have reason to be concerned because of a trigger, now is the time to reassure yourself that the subcontractor takes its IRCA obligations seriously.

Depending on the trigger, you may want to avoid requesting all the subcontractor's actual Forms I-9 and E-Verify records, as this could raise co-employment issues. The safest way to keep your arm's length status intact is to simply ask the subcontractor to explain how they assure compliance with the laws. However, if the trigger involves credible evidence that one or more employees are unauthorized to work, the GC may need to probe deeper. If the tip only involves one employee, then the GC should only demand records sufficient to show that the employee in question is authorized to work. If the employee asserts that he is authorized to work, he can be allowed on the job site for a reasonable period until the issue is resolved. If the employee admits to having no work authorization, he should be immediately barred from the worksite. If the credible tip involves a specific group of workers or all the subcontractor's employees, the same process would be applied to the entire affected group.

When a trigger occurs, a GC needs to ask itself: (i) what do I have knowledge (or constructive knowledge) of at this point that I need reassurances for? and (ii) what is the least amount of information I need to feel the issue is settled? If a subcontractor is unable or unwilling to comply with the general contractor's requests for additional information, the general contractor

may have to terminate the relationship entirely. While this would obviously be detrimental to the flow of the project and potentially affect deadlines, the risk of knowingly continuing a relationship with a violating subcontractor is too great a risk.

In summary, IRCA violations carry with them potentially devasting penalties. GCs must apply best practices to avoid violations and should protect themselves against violations by their subcontractors. While GCs are not required to verify employment authorizations of subcontractors, they are also not allowed to disregard potential violations by the subcontractors. When called upon to act, GCs should tread carefully to avoid co-employment issues while obtaining reassurance that the subcontractor is meeting its IRCA obligations.