




PRACTICAL ADVICE FOR THE REAL WORLDSM
COX | SMITH
ATTORNEYS

Immigration in the City
October 13, 2011



PRACTICAL ADVICE FOR THE REAL WORLDSM
COX | SMITH
ATTORNEYS

Objectives

1. **Brief Overview of Immigration Related Ordinances by Cities**
2. **Immigration Issues of Note for Cities - Immigration Status, Unlawful Presence, Contracts, Worksite Compliance**
3. **Policy Issues – Economics, Reform, Border Security**

© 2011, Cox Smith Matthews Incorporated 2

State and Local Encroachment

In the first half of 2011, the National Conference of State Legislatures (www.ncsl.org) reported that state legislators in the 50 states and Puerto Rico introduced 1,592 bills and resolutions concerning immigrants and refugees. This number exceeded the number introduced in 2010 during the same time frame by 16%. As of June 2011, 40 state legislatures enacted 162 laws and adopted 95 resolutions related to immigration. The “top topic hits” for this legislation include: employment, identification/driver’s licenses, and law enforcement.

Examples

- Alabama, Idaho, Kansas, Michigan, South Dakota, and Utah enacted laws requiring sex offender registries that mandate proof of citizenship or immigration status.
- The state of Montana enacted a law to require their Department of Motor Vehicles to use the federal SAVE database to verify a driver’s license or an identification card applicant’s lawful presence.
- Alabama, Georgia, Indiana, Louisiana, North Carolina, South Carolina, Tennessee, Utah, and Virginia all enacted E-Verify legislation, while Florida did so by executive order.

PRactical. ADVICE FOR THE REAL WORLD.SM
COX | SMITH
ATTORNEYS

9/28/11 N. D. Alabama Injunction

- Section 11(a): creating a misdemeanor for an unauthorized immigrant to apply for or perform work;
- Section 13: making it unlawful to conceal, harbor, or transport unauthorized immigrants;
- Section 16: prohibiting business to take tax deductions for wages to unauthorized immigrants; and
- Section 17: creating a civil cause of action against employer for not hiring or firing a U.S. citizen or legal immigrant while employing an unauthorized immigrant

© 2011, Cox Smith Matthews Incorporated 5

PRactical. ADVICE FOR THE REAL WORLD.SM
COX | SMITH
ATTORNEYS

Ala. Provisions Not Enjoined

- **Section 10: creating a state misdemeanor for not carrying an alien registration document;**
- Section 12(a): requiring a law enforcement officer to make a reasonable attempt to determine the citizenship and immigration status of a person stopped, detained or arrested when reasonable suspicion exists that the person is unlawfully present;
- Section 18: requiring law enforcement to transport a person arrested for driving without a license to a magistrate and if found to be unlawfully present the person shall be detained until prosecution or until handed over to immigration authorities;
- **Section 27: barring courts from enforcing contracts with unlawfully present aliens;**
- Section 28: requiring every public school to determine whether a student was born outside of the United States or to parents unlawfully present and report to the state board of education; and,
- Section 30: makes it a felony for an alien not lawfully present to enter into "business transactions" with state or local government (e.g., driver's licenses, business licenses, but not marriage licenses).

© 2011, Cox Smith Matthews Incorporated 6

Cities and Immigration Preemption

- Hazleton, Pennsylvania has reportedly spent at least \$2.8 million with some estimates totaling \$5 million as it has defended its ordinance all the way to the U.S. Supreme Court.
- Riverside, New Jersey endured a local economic downturn before the city rescinded its anti-immigrant ordinance and welcomed the return of immigrants.
- Farmers Branch, Texas has spent nearly \$4 million in legal fees and is expected to spend at least \$5 million to defend its anti-immigration statute.

Farmer's Branch Update

- **The policy required all prospective tenants in Farmers Branch to obtain rental licenses from the city, which could deny licenses to those who did not hold lawful immigration status in the United States. <http://www.farmersbranch.info/sites/default/files/Ordinance%20No%202952.pdf>.**
- **On October 4, oral argument in the Farmers Branch case was held before a three-judge panel of the Fifth Circuit, in New Orleans. Counsel for the City relied upon the recent U.S. Supreme Court guidance on preemption in the May 2011 decision rendered in *Chamber of Commerce v Whiting* concerning the ability of the State of Arizona to mandate the use of the federal E-Verify system to confirm work authorization and identity of new hires as well as to revoke business licenses for knowingly hiring unauthorized workers.**

Hazleton Ordinance

Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-6, renders it unlawful for any business entity to employ unauthorized aliens, as that term is defined by federal law. The IIRA Ordinance does not permit any Hazleton official to determine independently whether a person is authorized to work in the United States. The city must rely entirely upon the federal government's verification of any person's employment authorization, through the DHS E-Verify program. The IIRA Ordinance also makes it unlawful to harbor an illegal alien by knowingly providing rental accommodations to an "illegal alien".

Hazleton Case Update

On September 27, 2011 the city filed its brief with the Third Circuit explaining how the U.S. Supreme Court's recent decision in *Chamber of Commerce v. Whiting* invalidated the Third Circuit's prior holding in *Lozano v. City of Hazleton*. Previously in May of 2011, the Supreme Court vacated the Third Circuit's prior holding and ordered the appeals court to reconsider its decision in light of *Whiting*. See *Pedro Lozano, et al. v. City of Hazleton*, 3rd Cir.No. 07-3531, Sup. Ct. No. 10-772.

PRactical. ADVICE FOR THE REAL WORLD.SM
COX | SMITH
ATTORNEYS

Immigration Structure

- **DHS – CBP, ICE, USCIS**
- **DOS - NVC, VO, KCC**
- **DOL - ETA, OFLC, WHD, BALCA, ARB**
- **DOJ – EOIR, OSC, OIL**
- **SSA**
- **IRS**
- **HHS**

© 2011, Cox Smith Matthews Incorporated 11

PRactical. ADVICE FOR THE REAL WORLD.SM
COX | SMITH
ATTORNEYS

Key Regulations

- **Title 8 - USCIS**
- **Title 20 - DOL**
- **Title 22 - DOS**
- **Title 28 - DOJ**
- **Title 42 - Health and Human Services (HHS)**


© 2011, Cox Smith Matthews Incorporated 12



Organizations and Institutes

- **American Immigration Lawyers Association –**
www.aila.org
- **American Immigration Council –**
www.americanimmigrationcouncil.org
- **Migration Policy Institute –** www.migrationpolicy.org
- **Center for American Progress –**
www.americanprogress.org
- **National Foundation for American Policy –** www.nfap.com
- **National Immigration Forum –**
www.immigrationforum.org
- **National Immigration Law Center -** www.nilc.org

© 2011, Cox Smith Matthews Incorporated
13



Unlawful Presence

The INA does not contain any definition of “lawful presence” or “lawful present.” Immigration violations are typically civil in nature and violations result in exposure to inadmissibility to or removal from the United States. The definition of “unlawful presence” referenced in 8 USC §1182(a)(9)(B)(ii) relates to a ground of inadmissibility to the United States triggered in certain circumstances upon departure from the United States.

© 2011, Cox Smith Matthews Incorporated
14

Immigration Status

- USCIS Petition
- DOS Visa
- CBP Admission – I-94
- Extensions of Status

Unlawful Presence Questions

1. My legal permanent resident card expired – Am I lawfully in the U.S.? Yes, a legal permanent resident card is evidence of status, but it does not convey it. Of course, now a new hire cannot use an expired legal permanent resident card to prove work authorization for I-9 purposes.
2. I am a spouse of a U.S. citizen – Am I lawfully in the U.S.? No, marriage alone to a U.S. citizen does not convey lawful status. It does provide a means to apply to lawfully immigrate to the U.S.

More Unlawful Presence Quandaries

4. Can I be authorized to be in the U.S., but not authorized to work in the U.S.?
Absolutely, a spouse of an E-1 or E-2 treaty trader/investor may be authorized to be in the U.S., but not authorized to work without an Employment Authorization Document (EAD). An H-4 dependent of an H-1B employee can be authorized to be in the U.S., but not to work incident to their H-4 status.
5. I am the spouse of an E-2 nonimmigrant treaty investor with an E-2 visa. Can I be authorized to be in the U.S.? **Yes, if you have an E-2 dependent visa and lawful admission in E-2 status evidenced by your I-94 admission document issued by CBP.** Am I authorized to work in the U.S.? **No, not without an approved EAD.**
6. I just entered on my laser visa from Cd. Juarez, am I lawfully in the U.S.? **Without an I-94, yes, if you are within 25 miles of the border and have not been in the U.S. for more than 30 days.** Am I authorized to work? **NO.** How long may I remain in the U.S without an I-94 admission document issued by CBP on my laser visa? **Without an I-94, you must remain within 25 miles of the border and limit your visit to the U.S. to no more than 30 days.** What if I came into El Paso yesterday using my laser visa, but today I am in Dallas with no I-94 --- Am I lawfully in the U.S.? **NO.**

Sanctuary Cities

The term “sanctuary city” for cities focused on encouraging community policing is misleading. According to the International Association of Chiefs of Police and the Major Cities Chiefs Association without assurances to the immigrant community that civil law enforcement referrals would not occur upon reporting crime, critical community policing efforts would be destroyed. The civil law enforcement reference often refers to those who have overstayed their period of admission to the U.S. and those who entered without inspection to the U.S. An illegal entry under 8 USC §1325 though is a misdemeanor.


Warrantless Arrest

Under 8 USC §1357, Immigration and Customs Enforcement (ICE) officers may, “interrogate any alien or person believed to be an alien as to his right to be or remain in the United States” without a warrant. The ICE officer though does not have the right to detain the person for questioning without a warrant. See *Murillo v. Musgades*, 809 F. Supp. 487 (W.D. Tex. 1992).

What’s Happening to Employers?

See www.ice.gov – worksite enforcement


- Houston 6/11 – Mambo Seafood, 5 managers indicted - acceptance of fraudulently completed I-9s, use of multiple identities and SSNs
- Detroit 6/11 – Aquila Farms LLC, \$2.7 million in fines in lieu of forfeiture, allowing use of different names and SSNs, harboring via free housing
- Savannah 4/11 – Managers of McDonald’s – indicted as to use of stolen identities by employees



Constructive Knowledge and Subcontractors - Stealth Issue

Under 8 C.F.R. §274a.5, any person or entity knowingly using a subcontract after November 6, 1986 to obtain the labor or services of an alien in the U.S. knowing that the alien is an unauthorized alien with respect to such labor or services, is considered as the employer for purposes of INA §274A(a)(1)(A) violations concerning the unlawful employment of unauthorized aliens.


© 2011, Cox Smith Matthews Incorporated 21



Recent Developments

- Increased I-9 Audits
- Increased Enforcement Actions for Discrimination in I-9 Process by the Office of Special Counsel (OSC) of the Department of Justice (DOJ)
- Increase in State Laws to Mandate E-Verify and/or Employment Verification Penalties – AZ, MS, SC, UT
- Chamber of Commerce v. Whiting – Sup. Ct.

© 2011, Cox Smith Matthews Incorporated 22



Recent Developments

- June 2011 – H.R. 2164 Smith Mandatory E-Verify
- June 2011- Employment Authorization Libyan students
- Update Version of M-274 – 6/1/11
- May 2011 – I-9 Central
- May 2011 – TPS redesignated for Haiti through Jan. 22, 2013
- April 2011 SSA Announcement – Resumption of No Match Letters for FY 2010

© 2011, Cox Smith Matthews Incorporated 23



Recent Developments

- Self-Check (3/21/11) - Arizona, Colorado, Idaho, Mississippi, Virginia, or the District of Columbia expanded on 8/16/11 to California, Maine, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, Ohio, South Carolina, Utah, Texas, and Washington
- RIDE – Use of DMV records – Spring 2011

© 2011, Cox Smith Matthews Incorporated 24

PRactical. ADVICE FOR THE REAL WORLD.SM
COX | SMITH
ATTORNEYS

Penalties

Paperwork

- Not less than \$110 and not more than \$1,100 per individual

Civil

- Not less than \$375, and not to exceed \$3,200, for each authorized worker, first order.
- Not less than \$3,200, and not to exceed \$6,500, for each authorized worker, second order.
- More than 2 offenses: not less than \$4,300, and not to exceed \$16,000, for each authorized worker.
- Participating employer's failure to notify DHS of final nonconfirmation of employee's employment eligibility: not less than \$550 and not to exceed \$1,100.

© 2011, Cox Smith Matthews Incorporated

25


PRactical. ADVICE FOR THE REAL WORLD.SM
COX | SMITH
ATTORNEYS

Criminal Provisions

- 8 USC §1324 and 18 USC §371– Conspiracy to Transport and Harbor Unlawful Aliens
- 18 USC §1546 – Fraud and Misuse of Immigration Documents
- 18 USC §§1956 and 1957 – Money Laundering
- 8 USC § 1324(a) – Unlawful Employment of Aliens
- Constructive Knowledge – ICE Final Rule, 72 Fed. Reg. 45611 (8/15/2007) (Proposed 6/14/2006)

© 2011, Cox Smith Matthews Incorporated

26



Do You Know These Urls?

- **I-9 Form** – www.uscis.gov
<http://tinyurl.com/c96fsr>
- **I-9 Central** – www.uscis.gov
<http://tinyurl.com/5rsp5mm>
- **M-274 Handbook** – www.uscis.gov
<http://www.uscis.gov/files/form/m-274.pdf>
- **Office Special Counsel** – Dept. of Justice
<http://www.justice.gov/crt/about/osc/>

© 2011, Cox Smith Matthews Incorporated 27



Do You Know These Urls?

- **Social Security Number Verification System (SSNVS)** <http://tinyurl.com/44lwuxv>
- **E-Verify** – www.uscis.gov
<http://tinyurl.com/ysl4b>
- **IMAGE** – www.ice.gov
<http://www.ice.gov/image/>
- **Self Check** – www.uscis.gov
<http://tinyurl.com/5rhowzh>

© 2011, Cox Smith Matthews Incorporated 28

COX | SMITH
ATTORNEYS

Free DHS Training

- **Office Special Counsel Videos**
<http://tinyurl.com/yaat3fj>
- **E-Verify Videos**
<http://tinyurl.com/3r6sbtb>
- **Webinars – I-9, E-Verify, Self Check**
www.uscis.gov

© 2011, Cox Smith Matthews Incorporated 29

COX | SMITH
ATTORNEYS

E-Verify

- E-Verify is an internet based system operated by DHS that assists businesses in determining the identity and work eligibility of their new hires.
- A rebuttable presumption is established that the Employer has not violated §274A(a)(1)(A) of the INA with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in good faith compliance with the terms and conditions of E-Verify.

© 2011, Cox Smith Matthews Incorporated 30

PRactical. AMBIGUOUS FOR THE REAL WORLD.SM
COX | SMITH
ATTORNEYS

E-Verify Benefits

- A rebuttable presumption is established that the Employer has not violated §274A(a)(1)(A) of the INA with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in good faith compliance with the terms and condition .
- No person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith based on information provided through the confirmation system. DHS reserves the right to conduct Form I-9 and E-Verify system compliance inspections during the course of E-Verify, as well as to conduct any other enforcement activity authorized by law.

© 2011, Cox Smith Matthews Incorporated

31

PRactical. AMBIGUOUS FOR THE REAL WORLD.SM
COX | SMITH
ATTORNEYS

E-Verify: How it Works

Initial Verification will return one of 3 results within seconds:

- Employment Authorized
 - *The employee is authorized to work.*
- SSA Tentative Non-Confirmation
 - *There is an information mismatch with SSA.*
- DHS Verification in Process
 - *DHS will usually respond within 24 hours with either an Employment Authorized or DHS Tentative Non-Confirmation.*

© 2011, Cox Smith Matthews Incorporated

32

ICE IMAGE Program

Employers seeking to participate in IMAGE must first agree to:

- Submit to an I-9 audit by ICE, and
- To ensure the accuracy of their wage reporting, verify the Social Security numbers of their existing labor force utilizing the Social Security Number Verification System (SSNVS).
- Upon enrollment and implementation of DHS's best hiring practices, program participants will be deemed "IMAGE Certified" - a distinction DHS believes will become an industry standard.

IMAGE Benefits

- Not subject to a subsequent Form I-9 inspection for a period of two years, from the date of Form I-9 inspection completed as part of the IMAGE certification process, absence the existence of specific intelligence of unlawful employment.
- Mitigate/Waive fines if substantive violations are discovered on fewer than 50% of the Forms I-9. In instances where more than 50% of the Forms I-9 contain substantive violations, ICE will issue fines at the statutory minimum of \$110 per violation.

Economics

- *More than 40 percent of the 2010 Fortune 500 companies were founded by immigrants or their children.*
- *The newest Fortune 500 companies are more likely to have an immigrant founder. A little less than 20 percent of the newest Fortune 500 companies — those founded over the 25-year period between 1985 and 2010 — have an immigrant founder.*
- *The revenue generated by Fortune 500 companies founded by immigrants or children of immigrants is greater than the GDP of every country in the world outside the U.S., except China and Japan.*

© 2011, Cox Smith Matthews Incorporated

35

Border Security – Immigration Reform Roadblock

In Secretary Napolitano's testimony on May 4, 2011 before the Senate Committee on Homeland Security and Governmental Affairs hearing on "Securing the Border: Progress as the Federal Level," Secretary Napolitano noted that U.S. Customs and Border Protection (CBP) had begun the process of developing an index supported by CBP and third party data to measure security comprehensively along the Southwest border as well as the quality of life in the region.

© 2011, Cox Smith Matthews Incorporated


36



Border Security – Immigration Reform Roadblock – cont'd

The June 2011 report entitled, “The ‘New American’ Fortune 500” published by the Partnership for a New American Economy, indicates that more border security spending alone will not stop the flow of illegal immigrants and that a full path to legalization would add \$1.5 trillion to the GDP based on the January 2010 report published by the American Immigration Council and the Center for American Progress (“Raising the Floor for American Workers”).

© 2011, Cox Smith Matthews Incorporated 37




Presenter

Kathleen Campbell Walker
 Board Certified, Immigration and Nationality Law
 Texas Board of Legal Specialization
 915-541-9360
kwalker@coxsmith.com

www.coxsmith.com
 112 East Pecan, Suite 1800
 San Antonio, Texas 78205
 221 North Kansas Street, Suite 2000
 El Paso, TX 79901

© 2011, Cox Smith Matthews Incorporated 38



These materials are intended to stimulate thought and discussion and to provide the reader with useful ideas and guidance in the areas of labor and employment. The materials do not constitute, and should not be treated as, legal advice. Although we have made every effort to ensure the accuracy of these materials, neither the authors nor Cox Smith Matthews Incorporated assumes any responsibility for any individual's reliance on the written information presented during this presentation. Laws and regulations are subject to change at any time.

This PowerPoint presentation is an educational tool that is general in nature and for purposes of illustration only. The materials in this presentation are not exhaustive, do not constitute legal advice and should not be considered a substitute for consulting with legal counsel. Cox Smith has no obligation to update the information contained in this presentation.

CIRCULAR 230 DISCLOSURE: Pursuant to Department of Treasury Circular 230, this presentation is not intended or written to be used, and may not be used by the recipient, for the purposes of avoiding any federal tax penalty which may be asserted.

© 2011, Cox Smith Matthews Incorporated 39