

HUMAN RESOURCES & LABOR LAW

Stuart Kane LLP

Immigration Compliance in a Sanctuary State: How Two New California Laws Affect Employers

California's Senate Judiciary Committee currently estimates that there are more than 2.6 million undocumented immigrants in California and that one in ten California workers are undocumented. Clearly, immigration enforcement is an issue that has the potential to affect many California businesses.

The federal Immigration Control and Reform Act of 1986 (ICRA) has long made it illegal for employers to knowingly hire, recruit, refer, or continue to employ unauthorized workers. IRCA also requires employers to verify the employment authorization status of prospective employees. Employers are likely already familiar with the federal I-9 Employment Eligibility Verification form which must be completed by each employee at the time of hire. Employers should be sure to download the most recent version of the I-9 form which was revised July 17, 2017.

Employers may not be as familiar with two new California laws which significantly alter the immigration landscape in California. One law (SB 54) is aimed at state and local law enforcement. The other law (AB 450) is aimed squarely at California employers.

The "Sanctuary State" Bill (SB 54)

On October 5, 2017, Governor Jerry Brown signed into law Senate Bill 54, authored by California Senate President Kevin de Leon (D-Los Angeles), which made California a "Sanctuary State." Broadly speaking, the law prohibits state and local law enforcement agencies from using money or personnel to "investigate, interrogate, detain, detect or arrest persons for immigration enforcement purposes." There is no direct impact on employers. Instead, the law prevents state and local law enforcement from voluntarily assisting or cooperating with federal immigration authorities. In Orange County the law had immediate repercussions, as Sheriff Sandra Hutchens announced that the Sheriff's department would no longer participate in a program which had allowed Orange County deputies to act as immigration agents in its jail because it was in conflict with the new law.

The Immigrant Workers' Protection Act (AB 450)

Also on October 5, 2017, Governor Jerry Brown signed into law Assembly Bill 450, authored by California Assembly Member David Chiu (D-San Francisco), which imposed restrictions on California employers. Dubbed the "Immigrant Workers' Protection Act," the new law became effective on January 1, 2018.

Broadly speaking, the law prohibits California employers from voluntarily complying with ICE agents. Specifically, California employers may not provide voluntary consent to an ICE agent: (1) to enter any non-public areas of a place of work without a warrant; or (2) to access, review, or obtain the employer's employee records without a subpoena or judicial warrant. There is an exception for I-9 forms for which a Notice of Inspection has been provided to the employer. However, in that case the law requires an employer to provide notice to each current employee of the inspection of I-9 forms within 72

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hours of the employer receiving notice. The California Department of Labor Standards Enforcement (DLSE) has released a form for this purpose. In addition, the Act provides that an employer cannot re-verify the employment eligibility of a current employee at a time or in a manner not required by federal law. Employers who do not comply may face stiff fines up to \$10,000.

Potential Impact to California Employers

The Senate Judiciary Committee analysis of AB 450 specifically cited increased ICE raids and “new immigration enforcement priorities ushered in on the heels of President Trump’s inauguration” as a basis for the law. And indeed, significant ICE raids have been reported since the law was passed, including raids of 7-Eleven stores across the nation in January 2018 which resulted in 21 arrests and substantial fines and reported ICE raids and arrests in Northern California in February 2018.

However, there are concerns that the new law targeting employers goes too far. The Society for Human Resources Management (SHRM) has argued that administrative employees generally do not have sophistication with respect to immigration law and, if asked to do something by a federal

agent, understandably would want to comply with the agent’s directive. However, under the new law voluntary compliance with ICE agents under the circumstances outlined above and in the absence of a judicial warrant is illegal and may result in monetary penalties for the employer.

The new law also presents potentially complex legal questions. For instance, is it unconstitutional for California to forbid employers from consenting to a search of their own private property? Alternatively, does the law exceed the permissible scope of state police power in light of the Supremacy Clause of the U.S. Constitution? These questions may not have easy answers and may end being resolved in litigation.

Where Do We Go From Here?

At present, California Attorney General Xavier Becerra has been clear that he intends to enforce the law and seek fines up to \$10,000 against offending employers. Accordingly, California’s top government lawyer and law enforcement official is not backing down. For the foreseeable future, California has some of the most aggressive laws in the nation aimed at protecting unauthorized immigrant workers.