



## BSCAI Government Affairs Alert

# BSCAI Government Affairs Update

May 2009

The purpose of this e-mail is to update you on key employment, immigration and labor policy issues of interest to BSCAI members. We'll keep you informed as these issues and bills progress through legislative and regulatory bodies.

### Employment and Labor Policy Subcommittee Issue Update

#### **EFCA**

Conversations on Capitol Hill continue regarding the potential Employee Free Choice Act (EFCA) "compromise" proposals. Most major business groups oppose the EFCA in any form. There can be no proposal that stems from the EFCA that will result in positive change according to these groups. Under the guise of "labor law reform" the EFCA is an attempt by union leaders skew the careful balance of the US labor law system in their favor in order to increase union membership.

Carefully developed labor laws ensure both union representatives and employers have a fair opportunity to communicate with employees regarding union representation before a secret ballot election takes place.

The "compromise" provisions currently being discussed and proposed by Senator Specter and others on Capitol Hill include efforts to replace the "card check" language of the EFCA in exchange for "quick snap elections" or increased access to employees by paid union organizers. Here are some concerns:

- Quick snap elections by union bosses could control the amount of information that employees receive before making the important decision whether or not to form a union.
- Efforts to increase access by organizers would tip the balance of labor law for labor unions. Already employers are limited in what they can say and do during organizing drives.
- Other proposals have suggested that employees be able to mail in their union authorizing cards instead of having them collected by union organizers. However if authorizations cards are signed in public and then mailed to the NLRB, the process would still be subject to possible coercion.

It appears that the main point of contention in these discussions is on the EFCA's "binding interest arbitration". There has been some discussion of setting timelines for when first contracts should be agreed to with NLRB fines on the parties for failure to comply. Forcing contract provisions by a date certain eliminates an employers' role in negotiating a contractual agreement that best fits their workforce. The employer is the only stakeholder who can determine the best wage, benefit and work rule terms for their operation.

*Source: NAM (National Association of Manufacturers, 5/09)*

#### **Other Union Organizing Legislation**

While the RESPECT Act has not yet been introduced, efforts are in the making to redefine the definition of a supervisor under the National Labor Relations Act. This legislation that was introduced in the previous Congress and is considered to be a key priority for organized labor.



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Under this bill mid-level managers would be required to bargain as rank and file employees and adhere to the same wage, benefit and work rules under applicable collective bargaining agreements. This bill would create an inherent conflict of interest in the workplace by placing supervisors in the same bargaining units as the employees that they supervise.

### **Healthy Families Act**

It is anticipated that the Healthy Families Act (HFA) will be introduced soon. This bill would require employers with 15 or more employees to offer a one-size-fits-all paid sick leave package mandating seven days of paid sick leave to all “full-time” employees. A paid sick leave mandate would limit an employer’s flexibility in designing a benefits package that meets the needs of their unique workforce within the constraints of their labor market, resulting in significant costs for employers. This proposal actually harms employers with more generous leave programs than the minimum required under this bill as these employers would be “locked in” to their existing policies upon the bill’s enactment and wouldn’t be able to adjust their policies in light of changing economic conditions or changing workforce needs.

It is anticipated that the general public will support proposals to require paid sick leave, without necessarily understanding the cost that comes with it.

### **Family Medical Leave Act (FMLA) Issues**

There have been several bills introduced in Congress to expand the scope of the FMLA. Recently, the Family and Medical Leave Restoration Act (H.R. 2161) was introduced to repeal certain aspects of this rule such as the clarification for employers of how paid leave can be substituted for unpaid FMLA leave. Other bills that seek to alter the FMLA include one that would expand the application of the FMLA to include employers with 25 or more employees and would allow employees to use the FMLA leave for certain “parental leave” needs.

### **Workplace Flexibility**

The Working Families Flexibility Act (WFFA) was reintroduced this year. This bill would require employers of 15 employees to engage in a series of meetings with employees that request flexible work schedule options not currently offered by the employer. If an employer rejects a request by an employee to change their work schedule, this bill would require the employer to provide a detailed description of why the request was denied and the employee could appeal the decision to the Department of Labor. If the Department finds that the employer did not have sufficient grounds to reject the request, a penalty could be levied.

### **Paycheck Fairness Act and Related Legislation**

The Ledbetter Fair Pay Act quickly cleared both chambers of Congress and became the first bill signed into law by President Obama. The House of Representatives also passed the Paycheck Fairness Act along with the Ledbetter legislation; however Paycheck Fairness has not received similar support in the Senate.

The bill would allow for unlimited punitive and compensatory damages for claims made under the Equal Pay Act which would expose employers to significantly increased liabilities when facing allegations of gender based discrimination even when unintentional pay disparities occur. The bill also encourages class actions by requiring workers who do not want to participate in such suits to opt out, rather than opt in. The bill further eliminates key employer defenses when facing claims of alleged discrimination.



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However, the Government Accounting Office (GAO) study shows that after controlling for differences between men and women, all but 2 to 9 cents (depending on the year) of the pay gap over this period was accounted for by differences in measurable factors. Occupation is the measurable factor that contributed most to the gap. Many Senators have expressed concerns with the bill's potential for uncapped damages.

Separate from the Paycheck Fairness Act, is another recently introduced bill that would require employers to use a system of "comparable worth" in setting wages for their employees. This proposal goes MUCH further than the Paycheck Fairness Act as it broadens the Equal Pay Act to include more invasive definitions of gender-based discrimination. This bill would require employers to publicly disclose job categories and how much employees in these categories are paid. Such a system opens the door for countless numbers of plaintiffs to seek damages for possible discrimination in federal court.

### **Regulation: Workplace Health and Safety**

There is much activity on OSHA related issues so far this Congress. In late April, the Protecting America's Workers Act (PAWA) was introduced. This legislation that would expand the reach of OSHA, mandate higher civil and criminal penalties on employers (increases penalties for willful and repeat violations to \$120,000 and up to \$250,000 for violations that result in a fatality) and change to the OSHA complaint and appeals process by requiring abatement while citations are being contested. The legislation seeks to levy higher penalties on employers. There is no evidence to demonstrate that higher penalties will result in improvements of workplace safety.

### **Searching for State Sales Tax Rates?**

The link below allows you to search state sales tax rates for different services. This search engine tool is through the [Federation of Tax Administrators \(FTA\) Website](#).

Sales Taxation of Services:

Updates

[Summary Table - Number of Services Taxed by State & Category](#)

### **Department of Homeland Security Announces Changes and a Shift its Worksite Enforcement Strategy**

Following the recent Bellingham, Washington worksite raids in February 2009, the Department of Homeland Security's (DHS) top appointee, Janet Napolitano, promised a full review of the enforcement action. Secretary Napolitano stated to lawmakers that she was not apprised of the raid in advance and that she "want[ed] to get to the bottom of this as well." For the last two months, DHS officials have reviewed current protocols and suggested improvements and changes to the prior administration's procedures.

On April 30, DHS issued a press release reiterating its continued commitment to enforcement and indicated that the new enforcement tactics would have a more targeted focus on employers rather than on unauthorized workers. DHS's release reminded the public that the agency has a vital responsibility to enforce the law, engage in effective worksite enforcement to reduce the demand for illegal employment, and protect employment opportunities for the nation's lawful workforce.



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The press release also announced that “updated worksite enforcement guidance was distributed to Immigration and Customs Enforcement (ICE), which reflects a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers.”<sup>2</sup> At the same time, DHS acknowledged that unlawful workers would still be arrested if “found in the course of these worksite enforcement actions in a manner consistent with immigration law and DHS priorities.”

Most agree, however, that regardless of what the policy shift meant, enforcement still needs to be part of a comprehensive immigration reform strategy that addresses the 12 to 18 million undocumented individuals already in the United States and then punishes the “bad faith actor” employers that seek to take advantage of these workers.

The actual guideline document has not been released to the public as it includes sensitive law enforcement information.

### **WHAT IS THE NEW POLICY?**

According to the DHS fact sheet, the worksite enforcement guidance “reflects a renewed Department-wide focus targeting criminal aliens and employers who cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers.”

- **Control and comprehensive plan required**

What is clear is that ICE headquarters intends to exert much stronger control over the operations of its field offices. Agents were instructed to continue to adhere to the worksite reporting requirements, which include providing a 14-day notice to ICE headquarters in advance of developing or executing enforcement activity. This is part of an overall effort to ensure that action is taken only when there is a comprehensive plan for prosecution of employers.

- **Priorities for those involved in Interior enforcement**

The field guidance discusses the purpose and priorities of worksite enforcement. As noted in the DHS press release and recent news articles, DHS is reconfirming the “employment magnet” as one of the primary problems leading to continued illegal immigration. The press release points out the prior administration's record as a clear indication that the focus has to be shifted to make enforcement measures more effective. In particular, DHS noted that of the more than 6,000 arrests related to worksite enforcement in 2008, only 135 were arrests of employers. Prosecution and review of employers is now clearly a priority for ICE and the field offices are now mandated to shift resources in an effort to support this endeavor.

Agents around the country now understand their worksite specific mission to be:

- penalize employers who knowingly hire unauthorized workers
- deter employers who are tempted to hire unauthorized workers
- encourage employers to utilize compliance tools and conduct internal clean ups of their workforces

While criminal prosecution of employers is crucial to the new plan, headquarters notes that the Agency will continue to fulfill its responsibility to arrest, process and remove illegal workers encountered during worksite enforcement operations, but with greater humanitarian protections.



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- **Change to humanitarian policy**

A specific change to current policy in the guidance includes an amendment to the existing humanitarian guidelines. The protections currently in place for worksite enforcement actions involving 150 or more unauthorized workers have now been reduced to a lower threshold of 25. These protections include contacting the Department of Health and Human Services' Division of Immigration Health Services (DIHS) to provide personnel to attend to those being taken into custody at a processing site. The goal is to ensure that the people being arrested or the detainees' children are not placed at risk because of such an arrest. If DIHS is not available to coordinate with ICE, the policy instructs the agents to work with state and local social service agencies to provide support to the detainees.

### ***WHOM WILL ICE TARGET?***

The guidance suggests that ICE offices should look to prosecute employers after finding evidence of the mistreatment of workers, trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering and other violations.

ICE will be focusing on employers -- including owners, hiring managers and line supervisors --and using their tool box of investigative methods to create a comprehensive enforcement and prosecution plan. Employers involved in critical infrastructure and national security will remain favorite targets of ICE under the stated policy.

### ***HOW WILL ICE TARGET THESE EMPLOYERS?***

The mandate seems to require that ICE agents obtain a warrant, indictment or the blessing of a U.S. Attorney to prosecute the targeted employer before arresting employees for civil immigration violations at a worksite, but the new policy leaves the door open for other avenues if this is not possible. The new policy is silent regarding administrative warrants, but does remind agents to utilize all available civil and administrative tools, including civil fines and debarment from federal contracts, to penalize and deter employment of illegal immigrants.

- **The Tool box**

Among the recommended tools are use of informants and cooperating witnesses, introduction of undercover agents, as well as consensual searches and Form I-9 audits. When standards for criminal cases cannot be met, ICE will now diligently move to the imposition of civil fines and other penalties. This means that employers will be experiencing the use of increased fines. Employers can no longer ignore the Immigration and Reform and Control Act (IRCA) or view its successor I-9 civil penalties as "the cost of doing business." Debarment proceedings, which prohibit a company from being a federal contractor, will also be routinely brought against companies that have knowingly hired unlawful workers.

- **Increased I-9 inspections**

Employers should be prepared for an enormous increase in government audits, with more Notices of Inspection (NOIs) 6 to be issued to employers as a first step towards gathering evidence for a criminal case. This renewed emphasis on audits and inspections draws from the 1986 IRCA administrative civil penalty system, i.e., the "bad faith actors." In fact, the previous administration also acknowledged that civil fines were viewed as "just a 'cost of doing business' and therefore the system did not serve as a true economic inducement for employers to change their business model. The recent announcement confirms that ICE will continue to move towards making the cost of noncompliance too expensive to ignore. Inspections will produce a review of an employer's I-9 process; its training and procedures will also be reviewed by the agents.



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When criminal actions are not available, the field agents are advised to impose civil fines and other penalties. It is also important to remember there is no double jeopardy, where appropriate ICE can pursue both criminal sanctions and administrative fines. Thus, the I-9 inspection and other administrative tools outlined above are an important part of ICE's overall strategy.

### **WHAT SHOULD EMPLOYERS BE DOING?**

Employers should be proactive and conduct voluntary, in-house audits to assess the state of their company's I-9s, correct errors, and ensure proper compliance with immigration regulations. Often we find that many of our clients' I-9 practices need to be updated, which then provides an excellent opportunity for employers to develop and implement an ongoing training program and to formalize recordkeeping procedures. Both small and large companies alike should consider the following additional best practices when developing a comprehensive immigration compliance policy:

- diligently verify the identity of their job applicants;
- consider use of the E-Verify system - after careful consultation with an attorney;
- establish protocols for responding to "death and infant" Social Security No-Match letters;
- establish and maintain safeguards against use of the I-9 process for unlawful discrimination; and
- create a protocol for assessing contractors and subcontractors.

ICE is utilizing various tools to target employers, particularly those in industries involved with vital infrastructure and national security, as well as the usual suspects comprising "targeted" industries. Employers must take steps now to ensure they are in full compliance or face serious consequences. Actions taken before a government audit or investigation is initiated generally help mitigate damages, reduce exposure and save the company both time and money in the long run.

*The proceeding was adapted from an e-newsletter from the law firm of Greenberg Taurig LLP, D. Lurie May*

### **BSCAI Government Affairs Fund**

The BSCAI Government Affairs Fund (GAF) gives the building service contracting industry leverage in the political process. It works to influence federal legislation and regulation across the issue spectrum – any of which could wash out a business' bottom line. As an individual, it's nearly impossible to influence Congress on the issues that can completely devastate your business. There's truth to the saying that there's power in numbers. Fighting for your business' rights is one of the toughest and most important activities of the BSCAI.

BSCAI's GAF Team works on behalf of our members to keep you informed and fight devastating legislation and to influence positive legislation which ultimately helps strengthen the industry. Our team continues to build relationships with agency officials and key members of Congress to ensure that your interests, from veteran multi-state operators and franchises to our newest building service contractors, are not overlooked.

BSCAI's Government Affairs Fund Team's ability to defend your business rests solely on the financial support it receives from BSCAI members.

Your financial contribution will give BSCAI's Government Affairs Fund the needed strength to win on Capitol Hill. **Your contributions, large and small, help us make a difference.**



Policymakers, regulators and the media alike look to BSCAI for the latest in industry developments. Through your support, the GAF Team is able to deliver our message clearly and effectively to shape the debates that affect us all. The ability to maintain this advocacy presence and fight for building service contractors in Washington hinges upon the contributions we receive to support our GAF. A contribution to our industry's efforts is an investment that yields great returns for both your business and the building service contracting industry.

**[Download this form if you would like to make a contribution to BSCAI Government Affairs Fund.](#)**

The ability to maintain advocacy presence and fight for building service contractors hinges upon the contributions we receive in support of our Government Affairs Fund (GAF). Your generosity helps BSCAI achieve positive results for the building service contracting industry. Here are some options to support this fund.