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New Developments in Immigration-Related Enforcement for Employers

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The US Attorney General, Pam Bondi, recently issued guidance to all federal prosecutors regarding charging decisions, case prosecution, and sentencing in immigration matters. At the heart of this guidance, she asserts, “The Department of Justice [DOJ] shall use all available criminal statutes to combat the flood of illegal immigration that took place over the last four years, and to continue to support the Department of Homeland Security’s [DHS] immigration and removal initiatives.” In this context, her memorandum focuses on decisions to bring serious criminal charges against employers who violate immigration law, along with steps to follow when it comes to plea bargaining and pursuing maximum sentences.

Charging Decisions

When determining specific charges to bring, still within this context of immigration-related enforcement, prosecutors are instructed to pursue the most serious, readily provable offenses. These are defined as those carrying the most significant penalties or sentences. In an interesting twist, any deviation from this principle would require approval from DOJ headquarters.

Plea Bargaining

The guidance asserts that plea bargaining should adhere to the same principles as charging decisions. It would be inappropriate to begin with severe charges, the guidance tells prosecutors, only to abandon those charges during plea negotiations.

Sentencing

In terms of sentencing, says the Attorney General, if charges are appropriately determined upfront, a sentence within the US Sentencing Guidelines’ recommended range is considered suitable. In other words, in each step of the process, up through sentencing, prosecutors are expected to pursue the most severe penalties available.

Immigration Enforcement

As mentioned, the memorandum directs the DOJ to use all available criminal statutes to combat illegal immigration and support immigration enforcement initiatives. It continues, “Consistent with the core principle of pursuing the most serious, readily provable offense, U.S. Attorney’s Offices . . . shall pursue charges relating to criminal immigration-related

violations when such violations are presented by federal, state, or local law enforcement or the Intelligence Community.” Thus, with very limited discretion to decline criminal cases for prosecution, whenever a law enforcement agency refers a case, prosecutors would be expected to accept that case and pursue the most serious criminal violations, including harboring, engaging in unlawful employment, committing document fraud in the I-9 Employment Eligibility Verification, temporary non-immigrant visa (e.g., business visitor, H-1B, L-1, O-1, TN, etc.), or immigrant visa (“green card”) context. In other words, as one senior official recently told us, now with virtually all government resources focused on combatting illegal immigration, the goal will be to break the “employment magnet” in this country.

With immigration-related offenses as the new administration's top investigative and prosecutorial priority, it is critical that employers ensure that they are taking all necessary steps to establish strict compliance programs (particularly in the context of I-9 compliance and remediation), ensure their staffing agencies and contractors are adhering to applicable immigration law, and contact knowledgeable immigration and white-collar counsel when potential violations surface. The goal, as always, is to address such concerns before federal regulators appear on the scene.

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