

BusinessWeek

SMALL EMPLOYERS COPE WITH IMMIGRATION CRACKDOWNS

Immigration attorney Bill Flynn talks about how small business owners can comply with the new reality of tougher enforcement

Although comprehensive federal immigration legislation has been proposed repeatedly in recent years, none has passed. Instead there has been a crackdown on employers who violate existing immigration law. Raids, heavy fines, and even criminal prosecutions characterize this tougher enforcement, says immigration attorney Bill Flynn, of Fowler White Boggs Banker in Tampa, Fla. He spoke recently with Smart Answers columnist Karen E. Klein about how small-business owners can respond to the new policies. Edited excerpts of their conversation follow:

There have been congressional efforts over the past several years to pass immigration reform legislation, but those efforts have collapsed. Where are we now in terms of immigration policy in the U.S.?

Well, since we haven't been able to enact comprehensive immigration reform, what we're seeing now is a stricter enforcement approach. We're in a terrifying place, really. We can't seem to get a bipartisan, statesman-like approach to this, and meanwhile the business community is running scared thanks to all the publicity around some recent high-profile raids. Business owners are afraid of getting indicted. We've gone from a time when the government used to give wrist slaps to employers with illegal workers, then moved on to civil fines, and now they're going straight to criminal prosecutions. The problem

with stricter enforcement is that it reduces the pool of available workers and has a chilling effect on companies that would like to expand. It is not helping our economy.

In the past year or so, there have been some business owners and human resources staff members prosecuted criminally for employing illegal workers. Were there always provisions for bringing criminal indictments against employers, or are those new?

They were always part of the law, but in the past they would never be considered except in the most egregious situations. I remember there was a fast-food franchisee who was fined \$1 million, paid it, and went right back to employing illegals. That was a case where the government resorted to criminal prosecution as a last resort. But now you see them going to criminal prosecutions right away.

Isn't that being done for the deterrent effect, to discourage other companies from being too loose with their document checks?

It's overaggressive: Most employers don't like finding out that they were given phony proof of legal residence, and they aren't going to be upset about firing that person. But the situation is that for employers in certain industries, if they lose their foreign workers they're dead. They lose upcoming contracts and they might go out of

business. Foreign workers will take jobs that U.S. workers don't want and they are needed to replace our aging workforce. Our birth rate is flat, so we're not replacing the workforce we have domestically.

What we need is reform that gets the legislation right and allows the people who qualify—those who aren't criminals or otherwise inadmissible—to get in the back of the line and earn their way to permanent residence. We need to give them a chance, and from a selfish perspective we need the bodies.

What kinds of small companies are being affected by this crackdown and how?

This particularly affects small construction companies, restaurant owners, companies in the hospitality industry and agribusinesses like farms and orchards. Often small-business owners don't have the benefit of sophisticated HR staff or lawyers on staff. The owners may have checked their employees' documents, but copied paperwork and fake green cards get through anyway. So entrepreneurs get a double whammy: They know less about how to comply and they're often in industries that are full of illegal aliens.

The other problem they face is that on one hand they can't hire anyone who's illegal, but they also can't discriminate against job applicants because they suspect they might be illegal. So they're really asked to walk a very thin tightrope.

What tips do you have for small-business owners worried about this issue?

There's no substitute for the basics. Employers have to know what the hiring and employment eligibility verification procedures are and how to do them right. There's lot of good information posted online by the U.S. Citizenship and Immigration Services, as well as the U.S. Justice Dept. and the U.S. Labor Dept.

If you get a "no-match" letter, which indicates that an employee's Social Security number does not match the

documents on file, there are a series of procedures you'll need to follow. The Social Security Administration lays them out, although final implementation of this process is being challenged in court in California right now.

What should small-business owners do if they get word that their employment procedures are under investigation or being questioned?

They definitely need to get legal help from a labor and employment attorney or an immigration specialist. I also suggest that employers keep an eye on

pending court cases and know what's happening with current laws.

Another idea is to perform an annual audit that would ferret out any problems you might have with your documents. Have a third party come in, maybe an attorney or maybe a retired HR person, and have them look over your I-9 forms. This just gives you another set of eyes to help you avoid a potential problem.

By Karen E. Klein

Karen E. Klein is a Los Angeles-based writer who covers entrepreneurship and small-business issues.