The idea for *Immigration Compliance and Best Practices* came from the co-authors’ law practices and research. We found that there were few immigration compliance resources for employers with considerable immigration employment compliance responsibilities. Federal Acquisitions Regulation (FAR) government contractors and Securities and Exchange Commission (SEC) reporting companies are held to the highest of standards of immigration compliance. FAR contractors, for example, are required to participate in E-Verify, the Department of Homeland Security (DHS)’s electronic employment authorization verification system. They must have a compliance program and abide by rules that forbid the hiring of unauthorized employees. Knowingly hiring or continuing to employ such persons carries a severe potential penalty—debarment from their federal contracts.

Since the enactment of the Immigration Reform and Control Act of 1986 (IRCA), it is axiomatic that employers have the responsibility of utilizing the prescribed employer verification system to check the identity and employment authorization of newly hired employees. Employers must verify and maintain I-9 forms according to DHS regulations.

IRCA established an administrative civil and criminal penalty system that has been the ostensible deterrent for employers to adhere to the I-9 verification and records maintenance system. At various times in IRCA’s enforcement history, there has been an emphasis on the civil system of penalties; at other times, criminal enforcement was the program of choice to convince employers to comply with IRCA’s immigration employment laws.

Immigration and Customs Enforcement (ICE) provides employers with information concerning worksite enforcement activity on its website. ICE worksite enforcement

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2. The Immigration and Naturalization Service (INS) was the primary agency responsible for the administrative enforcement of the employer sanctions laws until the Homeland Security Act of 2002 created the successor enforcing entity, Immigration and Customs Enforcement (ICE), a component agency of the Department of Homeland Security (DHS). Pub. L. No. 107-296. Title IV. Subtitles C-F, 116 Stat. 2135 (Nov. 25, 2002).

activities typically begin with administrative I-9 inspections. These inspections, also known as I-9 audits, involve a review of Forms I-9, which employers are required to complete and retain for each individual hired in the United States. I-9 forms require employers to review and record each individual’s identity and work eligibility documents and determine whether the documents reasonably appear to be genuine and related to that specific individual. I-9 audits have been the main civil law enforcement technique to focus investigations on employers who knowingly hire unauthorized workers and to ensure employers are complying with their verification responsibilities. The civil immigration penalties that can be imposed by ICE audits were effectively doubled in 2016, increased in 2017 and increased again in 2018 to reflect inflation and to increase the deterrent effect of the IRCA employer sanctions penalties.

A congressional research report analyzed civil and criminal immigration enforcement measures and found that despite their potential impact, they are infrequently utilized and have little statistical impact. The DHS Office of Inspector General found that the IRCA civil penalty system has been inconsistently applied by the ICE field offices nationwide, with some offices generating fines and few warnings, and other offices issuing warnings and incidentally issuing fines. Nevertheless, an administrative inspection that audits an employer’s Forms I-9, seeking out deficiencies in the verification and attestation records, can be as damaging as a criminal search warrant when the I-9 forms contain evidence of the knowing hiring and continuing employment of unauthorized workers or a pattern or practice of civil or criminal violations.

The Obama administration’s civil enforcement actions of the immigration laws represented a marked shift in enforcement emphasis from the Bush administration’s policy of emphasizing criminal investigations of employers suspected of violating the federal immigration employment laws by the use of criminal search warrants.

4. §1.02.2.1.
The Trump administration’s worksite enforcement efforts initially focused on existing benefits programs that permit the employment of foreign nationals, with the rationale of eliminating their potential for abuse that could affect American workers. President Trump signaled in his 2016 general election campaign that bolstering the underlying immigration laws would be an important priority for his administration. Once he was in office, on April 18, 2017, he signed Executive Order 13788, “Buy American and Hire American,” at the Snap-on tool manufacturing company in Kenosha, Wisconsin. The executive order set in motion new enforcement efforts targeting the H-1B visa classification. President Trump directed the U.S. Department of Labor (DOL), Department of Justice (DOJ), DHS, and Department of State to review the integrity of employment-based foreign worker programs with his rationale that such enforcement would protect U.S. employees from lower-cost foreign labor.

On April 3, 2017, in advance of the Trump executive order, the DHS, the U.S. Citizenship and Immigration Services (USCIS), and DOJ issued news releases concerning the planned enforcement of the compliance provisions of the H-1B temporary worker program. The DHS release emphasized future H-1B enforcement activities utilizing employer business verification through commercial credit agencies focusing on the program abuses of dependent employers and the use of third-party worksites. The USCIS release referred to the enforcement of threshold H-1B specialty occupation standards regarding education and wages and listed the available public resources for reporting fraud and abuse.

DOJ’s news release focused on eliminating the potential for discrimination against U.S. workers in favor of H-1B labor. On April 7, 2017, DOL indicated that it intended to use its existing authority to initiate investigations of H-1B program violators, citing “greater coordination with other federal agencies, including the departments of Homeland Security and Justice for additional investigation and, if necessary, prosecution.”

The Trump administration demonstrated that its worksite enforcement investigatory efforts were ramping up with a nationwide service of ninety-eight notices of inspection to franchisees of 7-11 convenience stores in seventeen states, from California to Florida. While in recent years the service of notices of inspection have rarely involved the arrest of

workers determined to be unauthorized aliens, news reports of the arrests of twenty-one employees were an ominous warning for both employers and their workers:13 “Today’s actions send a strong message to U.S. businesses that hire and employ an illegal work force: ICE will enforce the law, and if you are found to be breaking the law, you will be held accountable,” Thomas D. Homan, the acting director of ICE told employers.14 Just months prior to the enforcement action, Homan had indicated that ICE would be increasing its worksite enforcement efforts by four to five times in the following year.15

The Trump administration’s new aggressive focus on worksite enforcement underscores the need for attorneys to insulate their clients from ongoing liability for past errors and to proactively implement programs for current and future immigration law compliance. High-profile employers need more than an “off-the-shelf” compliance approach. They require a specifically designed immigration compliance program that addresses the assessment and correction of important compliance risk factors. Given the range of legal risks involved, corporate employers will need to ensure that immigration compliance is made an integral part of a “generally effective compliance program” consistent with U.S. Federal Sentencing Guidelines to mitigate potential legal liability.16 Such an immigration compliance program should take into consideration such extrinsic factors as an employer’s size, the makeup of its workforce, SEC reporting responsibilities, contracting compliance requirements, ICE Mutual Agreement between Government and Employers (IMAGE) and/or E-Verify program membership, state and local legal requirements, past immigration enforcement history, and media exposure. An independently audited immigration compliance program can protect such an employer from ICE enforcement investigations, whistleblower actions, and other adverse consequences.

The corporate need for enhanced immigration compliance may be traced to the required public disclosure of contingent immigration liability under the Sarbanes-Oxley Act of 2002 (SOX).17 SOX is the federal law that requires certain mandatory public disclosures be made by companies in their SEC filings, including procedures established for the receipt, retention, and treatment of complaints regarding any audit matters and relating to internal compliance procedures.18 SOX also imposes criminal sanctions for document tampering with the intent to impede, obstruct, or influence the investigation of any department or agency of the United States.19

14. Id.
18. Id. at § 301(a)(4)(A).
19. Id. at § 802(a).
Six years following the enactment of SOX, IFCO Systems North America, Inc., entered into an immigration law–based corporate non-prosecution agreement with the United States Attorney for the Northern District of New York. Many of the SOX disclosure mandates appear within the IFCO agreement. The IFCO agreement is a helpful reference document for immigration compliance planning because of its rigorous enforcement conditions, which provide insight into the government’s favored immigration audit standards and procedures.

In the IFCO criminal case, the corporate defendant agreed to the corporate non-prosecution agreement (NPA). In the agreement, the company acceded to immigration compliance terms for a four-year period and a forfeiture and penalty payment plan that totaled $20.7 million over four years. The IFCO NPA also imposed a comprehensive, risk-based immigration compliance program consistent with U.S. Sentencing Commission guidelines. This marks the genesis of today’s integration of DHS immigration compliance within the ethics and compliance programs that were developed as a result of the Federal Sentencing Commission Guidelines and its amendments.

The stakes were raised again with the October 30, 2013, civil settlement agreement between Infosys Limited (Infosys), an IT consulting company headquartered in Bangalore, India, and the U.S. government. This settlement agreement, filed in the Eastern District of Texas, resolved allegations that Infosys had abused the B-1 and H-1B visa programs and its I-9 verification and reverification responsibilities, in exchange for a $34 million fine, a record immigration-related settlement amount. In its 6K filed with the SEC, Infosys had provided information regarding a pending investigation of the company by a federal grand jury. Infosys ultimately agreed to a compliance program, which included internal I-9 auditing, a reporting requirement for B-1 usage, an agreement to continue to use only detailed B-1 invitation letters, and the continued use of corporate disciplinary processes for employees that violate the immigration laws of the United States.

On August 13, 2014, Grand America Hotels and Resorts signed a corporate NPA agreeing to immigration compliance terms for twelve months and to forfeit $1.95 million to the DHS. The Statement of Facts in the Grand America case indicates that the investigation was initiated by an administrative audit by Homeland Security Investigations (HIS), which was completed in September 2011 and resulted in termination of 133 undocumented workers. Apparently, prior to the conclusion of the audit, lower-level employees and midlevel managers from the Grand America Hotel created sham temporary employment agencies for the purpose of rehiring forty-three of the terminated workers, who returned to work as employees of these agencies under different names and using fraudulent documents. In the settlement, Grand America agreed to an extensive review of its

hiring procedures, to retrain its hiring managers in immigration law, retrain its human resources staff in I-9 procedures, agreed to include language in its contracts with vendors providing on-site labor to mandate that these companies comply with immigration law, and to continue to use E-Verify.

The Asplundh case demonstrates that immigration violations can trigger significant criminal liability for both corporate and individual defendants. A privately owned company headquartered in Willow Grove, Pennsylvania, Asplundh Tree Experts, Co. (Asplundh) is a tree trimming and brush clearing company with a national workforce of over 30,000.

On September 28, 2017, Asplundh pled guilty to the unlawful employment of undocumented workers in connection with a hiring scheme designed to evade immigration laws. The company was fined a total of $95 million: $80 million in criminal forfeiture fines and $15 million in civil monetary penalties, resulting in the largest fine ever levied in an immigration case.

After a 2009 I-9 audit by Homeland Security Investigation (HSI) revealed unauthorized individuals were employed at the company, Asplundh terminated at least 100 employees. However, according to the U.S. Attorney, the highest levels of management within the company then tacitly approved of the actions of a mid-level supervisor who instructed lower-level supervisors to hire and rehire some of the employees in many regions of the United States by accepting fake documentation, including fraudulent Permanent Resident Cards and Social Security cards.

An HSI audit and investigation revealed that from 2010 until December 2014, the company decentralized its hiring purposefully so the highest levels of management could remain willfully blind while second- and third-level supervisors hired workers they knew to be ineligible. The U.S. Attorney’s investigation found this decentralized model tacitly perpetuated fraudulent hiring practices that maximized productivity and profit, “providing all the incentives to managers to skirt immigration law.”

The purpose of a forfeiture penalty is to seize illegal gains and discourage company criminal activity. In determining the penalty in the Asplundh matter, the judge reviewed the company’s payroll of approximately 30,000 workers, which reflected the employment of thousands of undocumented workers over the four-year period of the investigation. Special Assistant U.S. Attorney Josh A. Davison argued that fraudulent techniques were used to hire at least 10% of that workforce and that the company’s attributed profits were $800 million during the four-year period in question. District Court Judge John Padova determined that a criminal forfeiture of $80 million was appropriate. In addition, the judge assessed civil monetary penalties of $15 million, for a total penalty of $95 million.

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24. Id.
25. Id. Also, Chris Palmer and Jane M. Von Bergen, Montco-based Asplundh Admits Hiring Undocumented Immigrants, Agrees to Pay $95 Million, The Inquirer (Philadelphia), Sept. 28, 2017,
The facts of the Asplundh case reflected repeated violations of immigration laws. ICE Acting Director Thomas Homan took the opportunity to use the case to send a message, announcing, “Today marks the end of a lengthy investigation by ICE Homeland Security Investigations into hiring violations committed by the highest levels of Asplundh’s organization. Today’s judgment sends a strong, clear message to employers who scheme to hire and retain a workforce of illegal immigrants: we will find you and hold you accountable. Violators who manipulate hiring laws are a pull factor for illegal immigration, and we will continue to take action to remove this magnet.”

The message that the IFCO, Infosys, Grand America, and Asplundh cases send is that companies are at risk for foreseeable adverse consequences if they do not have an effective immigration compliance program in place.

It is our hope that Immigration Compliance and Best Practices leads to wider understanding of employer responsibilities and the programs that ensure effective compliance. If this American Bar Association publication results in effective nationwide employer compliance with federal law, the authors will have achieved our desired objective.


26. Id.