

# Scrutinize Contractor Hires to Avoid Wal-Mart Problem

BY MARK IVENER

Few sectors of the American economy depend more on immigrant workers than the construction, and building-and-grounds maintenance trades. As the president of a roofing company in Texas, testifying on behalf of the National Roofing Contractors Association, told Congress last year in a hearing on immigration reform, most Americans regard working on a hot roof as an undesirable profession. So 95 percent of his employees are Latino, most of whom were not born in the United States. That workforce composition is not uncommon in the roofing industry, he said.

The story is much the same for janitorial and grounds-maintenance businesses, which are disproportionately staffed with foreign-born workers, according to the U.S. Bureau of Labor Statistics.

Developers, construction companies, property-management firms and other companies that regularly farm out work to these immigrant-dependent businesses may think that the challenge of determining the lawful immigration status of the workers is solely the subcontractors' responsibility. A recent landmark settlement involving Wal-Mart Stores Inc. has put that comforting, but mistaken assumption to rest.

The settlement outlined in a consent decree filed March 18, 2005, followed a series of raids in an investigation that began in 1998, and culminated in the arrests of at least 350 suspected illegal aliens who were working as janitors in Wal-Mart stores. The 12 companies that had hired and managed the immigrants pleaded guilty to criminal violations of immigration laws and agreed to pay \$4 million in fines.

Wal-Mart avoided criminal charges. But the retail giant, whose annual sales in 2004 reached more than \$288 billion, was slapped with a record \$11 million in fines to resolve civil charges filed against it as a result of the independent contractors' illegal hiring practices.

Wal-Mart pleaded ignorance, noting that it did not employ or supervise the janitors directly. But the federal government—specifically, the U.S. Immigration and Customs Enforcement unit, the largest investigative agency of the Department of Homeland Security—rejected that defense. Wal-Mart could not pass on corporate responsibility in this case, federal authorities concluded.

In addition to paying the fine, Wal-Mart signed a consent decree prohibiting the company from ever hiring, recruiting or continuing to employ illegal immigrants in the future. The settlement also required the company to implement stronger internal controls to ensure future compliance with immigration laws. Wal-Mart further agreed to provide additional training to all current and future store managers regarding their legal obligations to enforce immigration laws without violating anti-discrimination laws.

Beyond the heightened responsibilities regarding its own workforce, Wal-Mart also agreed to develop a method to verify that all its independent contractors are complying with immigration laws. That represents a significant break with traditional business immigration practice, in which independent-contractor agreements assumed a level of distance between an employer and the independent contractors, over which the employer was presumed to have minimal or no control.

The Immigration and Customs Enforcement unit intends to use the Wal-Mart settlement as a precedent not just for large-scale corporations, but for smaller businesses as well. The settlement makes it clear that as far as immigration officials are concerned, the employer can be investigated and prosecuted fully for its contractor's violations of immigration laws. The Wal-Mart case also sends a message that the government is no longer putting enforcement of immigration laws on the back burner.

For businesses that regularly use independent contractors—particularly contractors in construction, janitorial, maintenance and other trades that are disproportionately filled with low-wage, immigrant workers—the lessons from the Wal-Mart case are clear. Employers must now be much more vigilant about complying with the immigration laws that govern hiring their own employees and their subcontractors' workforce.

A review of internal hiring practices should come first. Employers should obtain assurances from their immigration attorney that their company-wide policies and procedures regarding verification of the immigration status of employees—including completing I-9 forms, the Employment Eligibility Verification Form—comply fully with the law.

Employers also must ascertain that company managers, who have the most significant day-to-day interactions with employees and oversee completion of I-9 forms, are properly trained regarding the obligations imposed by immigration laws. To assure continued compliance, companies should implement a system of regular audits of I-9 practices.

Reviewing the practices of contractors can be a bigger challenge. Though employers aren't legally required to go as far as reviewing their contractor's employee records to verify proper documentation, under their attorneys' counsel, they may contractually require independent contractors to furnish them with copies of I-9s and other documentation for the workers brought on site.

At a minimum, employers' agreements with independent contractors should include provisions stating that the contractor will comply with all immigration laws and regulations, including the requirements pertaining to I-9s. Agreements also should include a provision requiring the contractor to compensate the employer for any liability it incurs as a result of the contractor's violations of immigration laws.

Federal authorities have sent employers nationwide a strong message with the heavy fine imposed on Wal-Mart. Ignorance about an independent contractor's hiring practices will no longer be accepted as an excuse and will not shield a company from civil and criminal prosecution, if the contractor employs illegal immigrants.

However, by taking steps to ensure that their own verification procedures, as well as those of the contractors they use, are in order, and by maintaining vigilance for any signs of non-compliance, employers should be able to minimize their risk and avoid Wal-Mart's predicament.

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