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Employers Beware: ICE Is Ramping Up I-9 Audits to Record Levels

By Alka Bahal

More than 5,200 businesses around the country have been served with I-9 inspection notices since January in a two-phase nationwide operation conducted by U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI) in what appears to be the largest I-9 inspection action ICE has undertaken to date.

This latest round of workplace audits on employers clearly indicates that the I-9 inspection is now a top priority in U.S. immigration enforcement policy that targets employers rather than employees via the workplace raids of the past.

This alert outlines the current processes in place for I-9 inspections and includes practical advice on how to respond to an audit as well as steps to take now to ensure that your business is in compliance.

Notice of Inspection – NOI

The inspection process begins with HSI serving a Notice of Inspection (NOI) on an employer, which informs them that HSI will perform a comprehensive review of (i.e. audit) their hiring records (specifically Form I-9s and associated documents) to determine compliance with employment eligibility verification laws. Upon receiving an NOI, an employer is required to produce the company's I-9s within three business days, after which ICE will conduct an inspection for compliance.

In Phase I of the current operation, between Jan. 29 and March 30, 2018, HSI served 2,540 NOIs and made 61 arrests. During Phase II, between July 16 and 20, HSI served 2,738 NOIs and made 32 arrests.

ICE is the federal agency responsible for upholding the Immigration Reform and Control Act (IRCA), a law designed to protect jobs for U.S. citizens and others who are lawfully employed, eliminate unfair competitive advantages for companies that hire an illegal workforce, and strengthen public safety and national security.

Under IRCA, employers are required to verify the identity and employment eligibility of all individuals they hire, and to document that information using the Employment Eligibility Verification Form I-9. ICE/HSI uses the I-9 inspection program to promote compliance with the law, part of a comprehensive strategy to address and deter illegal employment. Inspections are one of the most powerful tools the federal government uses to ensure that businesses are complying with U.S. employment laws.

A 'Culture of Compliance'

Derek N. Benner, Acting Executive Associate Director for HSI, stated: "Employers need to understand that the integrity of their employment records is just as important to the federal government as the integrity of their tax files and banking records. All industries, regardless of size, location and type are expected to comply with the law."

Benner contends that worksite enforcement "protects jobs for U.S. citizens and others who are lawfully employed, eliminates unfair competitive advantages for companies that hire an illegal workforce, and strengthen public safety and national security."

HSI increased the number of I-9 audits, Benner said, to “create a culture of compliance among employers.”

All employers in the United States are required to have a Form I-9 on file for all employees to verify their identity and authorization to work in the United States. The law requires that employers execute this process upon hire of an employee, review and record the individual’s original, valid identity documents and determine whether those documents reasonably appear to be genuine and related to the individual.

HSI follows a detailed process when conducting a Form I-9 inspection. Guidance on that process and the associated civil fine structure can be found [here](#). This guidance outlines ICE’s process for a Form I-9 inspection, the penalties for various related violations, and the factors ICE considers during the course of the inspection and in determining a fine, including mitigating or enhancing factors involved.

Civil Fines and Potential Prosecution

Employers determined not to be in compliance with the law face the likelihood of civil fines and could ultimately face criminal prosecution if it is determined that they were knowingly violating the law. All workers encountered during these investigations who are unauthorized to remain in the United States are subject to administrative arrest and removal from the country.

Failure to follow the law can result in criminal and civil penalties. In FY17, businesses were ordered to pay \$97.6 million in judicial forfeitures, fines and restitution, and \$7.8 million in civil fines, including one company whose financial penalties represented the largest payment ever levied in an immigration case. (See our earlier [post](#) on this topic.)

Monetary penalties for substantive and uncorrected technical violations, errors that the layperson often view as ‘paperwork errors’ range from \$220 to \$2,200 per violation and penalties for knowingly hiring and continuing to employ violations range from \$3,548 to \$19,242 per violation. In determining penalty amounts, ICE imposes a higher fine rate on employers with a higher percentage of I-9s with violations and then considers five factors to either

enhance or mitigate fine amounts: the size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers and history of previous violations.

What To Do if the Government Wants To Inspect Your I-9s:

- Call your immigration attorney immediately. The time period for responding to ICE is short and it is critical that documents submitted in response to the notice be well-organized and presented in the best light possible.
- DO NOT submit any documents to ICE without seeking the advice of counsel.
- DO NOT consent to an immediate inspection if agents show up without warning. You have up to three days to respond/submit documents.
- DO NOT submit more than what is asked for (such as expired I-9s for former employees, payroll records listing employees not subject to the inspection, etc.)
- DO NOT let agents take original records without permitting you to take copies
- DO NOT allow officers to talk with any employees or company officers before you call your attorney.
- If Department of Labor agents show up for an inspection without notice, decline the inspection. They will notify USCIS/ICE.
- DO NOT panic and try to correct or otherwise repair your records without the assistance of qualified immigration counsel. Corrections made or new I-9s prepared after the issuance of an NOI are not accepted by ICE, and may create the appearance of bad faith.

The Tools of Protection

Employers that have not yet received an NOI should take immediate steps to protect against possible future violations.

Two key tools in ensuring IRCA compliance are private internal audits and specialized training.

Employers should conduct private internal audits with the assistance of a qualified immigration professional to review I-9 documents and correct any errors in advance of an inspection. This type of periodic audit can not only uncover problems in time to be corrected before the imposition of sanctions, but can also demonstrate the employer's good faith efforts to comply with IRCA's verification requirements, a mitigating factor in ICE's penalty determination process. Because private I-9 audits can be performed over time and at the employer's convenience, it is less arduous for a company than the three-day audit period forced by an inspection notice.

Many problems with I-9s stem from simple misunderstandings of the procedures and requirements. This can easily be rectified by having a qualified attorney train your personnel about proper procedures. Because the work environment and employee culture changes with some frequency, along with periodic legal changes impacting the I-9 process, refresher training courses for already "expert" personnel are also recommended.

Although employers can select from a variety of service providers to meet their I-9 audit and training needs, legal professionals with experience with immigration, employment and labor law are better equipped to handle IRCA compliance issues, including audits, training and formal inspections. Fox Rothschild provides companies of all sizes with IRCA compliance training seminars and confidential, internal I-9 audits.

For more information regarding the information in this Alert, or if you require assistance with your company's immigration or employment issues, including IRCA compliance, I-9 audits, I-9 Inspections, visa processing or comprehensive immigration strategy, please contact Alka Bahal at 973.994.7800 or abahal@foxrothschild.com, or any member of our Immigration or Labor & Employment Practice Groups.

Resource:

[ICE - Form I-9 Inspection Overview](#)