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Don't Freeze Up: Know What to Do When ICE Comes Knocking

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Employers should understand how to handle I-9 inspections by Immigration and Customs Enforcement (ICE) and proactively prepare for possible enforcement actions to avoid penalties and prosecution. While the uptick of ICE's deportation enforcements has made headlines, their I-9 inspections have received less media attention despite similar dramatic increases. In 2017, ICE conducted 1,360 I-9 inspections, while in 2018 it conducted more than four times that amount. If this trend continues, employers can expect to see many more inspections in 2019.

Our [alert](#) in April addressed the steps employers must take if the Social Security Administration (SSA) sends an Employer Correction Request Notice, otherwise known as a "No-Match Letter," that identifies an inconsistency between SSA records and the employee name and Social Security Number submitted on wage and tax statements. However, even if you follow all of the steps outlined in our alert, you may not be out of the woods.

What, exactly, is an I-9 inspection, and what should you do (and not do) if ICE comes knocking.

What Is an I-9 Inspection?

An I-9 inspection is ICE's mechanism for enforcing U.S. immigration law. All employers are required to verify the identity and employment eligibility of its employees. To accomplish this, employers must fill out and

maintain a Form I-9 for all new hires and retain records for terminated employees on file for three years from the date of hire or one year from the date of termination, whichever is longer.

ICE initiates an I-9 inspection by serving an employer with a Notice of Inspection (NOI), compelling the business to provide Forms I-9 and associated records (including payroll records and a list of employees with hire and termination dates, among other documents) to confirm compliance with employment eligibility verification laws. By law, ICE must provide employers at least three (3) business days to produce the requested records. ICE then conducts an inspection of the Forms I-9 for compliance by examining them individually in their own offices. Once the inspection is complete, ICE will notify the employer of the results in writing. The types of notices vary, but the following represent the most common ones:

Notice of Inspection Results – Also known as a "compliance letter," this notifies a business that it was found to be in compliance.

Notice of Suspect Documents – Advises the employer that, based on a review of the I-9s and documentation submitted by the employee, ICE has determined that an employee is unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing

to employ that individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if they believe the finding is in error.

Notice of Discrepancies – Advises the employer that, based on a review of the I-9s and documentation submitted by the employee, ICE has been unable to determine their work eligibility. The employer should provide the employee with a copy of the notice, and give the employee an opportunity to present ICE with additional documentation to establish their employment eligibility.

Notice of Technical or Procedural Failures – Advises the employer of identified technical violations, providing the employer 10 business days to correct them and advising the employer that these violations will become substantive violations if left uncorrected by the tenth business day.

Warning Notice – Issued in circumstances where substantive verification violations were identified, but circumstances do not warrant a monetary penalty and there is the expectation of future compliance by the employer.

Notice of Intent to Fine – Advises the employer of a penalty issued for violations involving substantive, uncorrected technical information and knowingly hiring and continuing to employ those deemed unauthorized to work.

Employers who are found to be noncompliant may face civil fines and the possibility of

criminal prosecution if it is determined that the employer knowingly violated the law. Monetary penalties for “knowingly hiring and continuing to employ” violations can range from \$375 to \$16,000 per violation, while penalties for substantive violations, which include failing to produce an I-9, can range from \$110 to \$1,100 per violation.

What to Do (and Not Do) if ICE Issues an NOI

Businesses *should* take the following steps after receiving an NOI:

- First, contact your immigration attorney. The law only requires ICE to give you three days to produce the requested documents and your immigration attorney may be able to negotiate for a longer period and can help ensure the responsive documents are all in order.
- Work with your attorney to prepare the requested documents for ICE. This preparation may include separating I-9s from employee personnel files if they were stored together (we recommend Forms I-9 be kept separate from personnel files), reviewing I-9s for compliance and consulting with your attorney about legally permissible corrections and completing otherwise incomplete forms.

There are also several actions an employer *should not* take upon receiving an NOI:

- Do not consent to waive the three day period if ICE agents show up without warning; you are legally entitled to take the full three business days (or longer if your attorney can secure it) before responding. If, however, the ICE agents have a warrant, you are not entitled to the three-day notice period and you cannot refuse their entry.

- Do not submit any documents to ICE without first speaking to your attorney.
- Do not try to correct errors or omissions on the I-9s without first speaking with your attorney.
- Do not submit more documents than what has been requested by ICE.
- Do not let ICE take original documents without first making copies.
- Do not let ICE agents speak to anyone without first speaking with your attorney.

Begin Preparations Today

You may be confident that you have properly filled out all of your I-9s and all of your employees are eligible to work in the United States. And you may never receive an NOI and have to handle an I-9 inspection. However, this era of increased I-9 inspections has swelled the possibility of potential employee audits. Preparation is the best move. Be proactive, consult with your immigration attorney and request that your counsel perform an internal inspection to review your I-9s and make necessary corrections.

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