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I-9 audits and fines are on the rise

Is your company prepared for an investigation?

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In April 2009, the Department of Homeland Security (DHS) implemented a new immigration enforcement strategy, carried out by the U.S. Immigration and Customs Enforcement agency (ICE). This strategy has far-reaching implications for employers. According to DHS Assistant Secretary John Morton, "ICE is committed to establishing a meaningful I-9 inspection program to promote compliance with the law. This nationwide effort is a first step in ICE's long-term strategy to address and deter illegal employment."

Under I-9 laws, an employer must verify the identity and employment eligibility of a new hire by completing and retaining a Form I-9, Employment Eligibility Verification, for each individual it employs in the United States.

A review of government enforcement activities within the last year shows a substantial increase in the number and scope of I-9 audits and investigations. In 2009, there were 142 Notices of Intent to Fine (NIF), totaling \$15.8 million in fines. In all of

2008, ICE issued only 32 NIFs, totaling \$2.3 million. ICE initiated 1,897 investigations in 2009, compared to 605 investigations in 2008. In addition, ICE conducted more than 1,069 Form I-9 inspections in 2009, compared to 503 Form I-9 inspections in all of 2008.

This article looks at the anatomy of an ICE I-9 investigation and provides specific guidelines for employers on how to prepare and respond to a government I-9 audit.

What happens in an ICE I-9 audit?

An I-9 investigation is formally initiated when ICE, either by mail or in person, issues a Notice of Inspection to an employer, ordering the employer to produce its Forms I-9 for inspection. Employers must retain I-9s for all current employees and for employees terminated within the past year or within three years of their date of hire, whichever is later. By law, ICE must allow the employer at least three business days to produce its I-9s, unless ICE issues a subpoena or warrant.

Along with the Notice of Inspection, ICE can also issue an

administrative subpoena compelling the employer to produce other employment files including, but not limited to, monthly payroll records, W-2s, copies of state wage detail reports and unemployment insurance quarterly tax reports, copies of quarterly tax statements, copies of communication with the Social Security Administration regarding mismatched or inaccurate records, business licenses, and/or copies of company procedures and policies regarding I-9s. Once ICE has completed its review of the I-9s, it will notify the employer in writing of the audit results.

Various types of notices can be issued. When an employer is found to be in compliance, ICE generally will issue a Notice of Inspection Results. If ICE has found I-9 violations but has decided not to fine the employer, a Warning Notice may be issued. If more serious violations have been found or if no remedial actions were taken by the employer, then ICE may issue a Notice of Intent to Fine (NIF). An employer may also receive a Notice of Suspect Documents when ICE has determined that the employer has employees who are not authorized to work.

Finally, a Notice of Discrepancies can be issued when I-9s do not provide sufficient information to determine the employment eligibility of the employee. If fines are proposed by ICE through the issuance of a NIF, employers do have an opportunity to either enter into settlement negotiations with ICE or request a hearing to challenge

the findings and the amount of fines.

As with any government investigation, the company's attorney should proactively communicate with ICE to determine the scope, subject, and basis of the audit. Most importantly, experienced immigration counsel can assess the potential liabilities that the employer faces before an NIF is issued. Employers must take action before an audit occurs to ensure that their I-9 verification procedures and records can withstand government scrutiny.

How to prepare for an audit

Employers should take the following steps to prepare for an I-9 audit. First, create an I-9 compliance policy that is integrated with overall personnel policy. The most essential rule in regards to I-9 compliance is to apply the policy uniformly to all employees. A comprehensive written policy will help establish rules for all employees to follow, will establish good-faith efforts towards compliance, and potentially could mitigate penalties. Also, review current hiring policies to ensure conformity with I-9 requirements, and make certain these policies do not violate anti-discrimination laws.

A company should also designate an overall I-9 compliance administrator. To ensure consistency, designate one person who is charged with centralized oversight, management, and training of the company's compliance program.

To provide guidance to hiring managers about I-9 procedures, managers should know who must complete Form I-9; when and how to conduct verification; what permissibly may be asked prior to the actual hiring; what limits may be placed on hiring of certain individuals; what, how, and for how long I-9 records should be maintained; whether the I-9 support docu-



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ments should be copied; and when I-9s need to be re-verified.

To ensure compliance and mitigate damages, the employer should develop and conduct periodic self-audits. In addition, once a Form I-9 is completed, a second company representative should review the I-9.

Any employer who has not been complying adequately with the I-9 verification procedures should take immediate steps to ensure full compliance. Failure to put verification procedures into place can be viewed by ICE as a lack of good faith in compliance, subjecting an employer to the maximum penalties, even if no undocumented workers have ever been hired. Companies should also determine the corporate response to receipt of letters from the Social Security Administration or the Internal Revenue Service regarding inaccurate wage reporting information.

Finally, determine whether to register with E-Verify, the voluntary, web-based program that allows employers to electronically verify the information provided on the I-9. E-Verify is meant to supplement the current I-9 employment eligibility verification process. Employers should be cautious when deciding to register with E-Verify, as it imposes significant obligations and requires employers to enter into a Memorandum of Understanding with the SSA and the DHS.

How to respond

Once a notice of inspection has been issued, a company should follow its investigation response plan. The investigation response plan should include the name and contact information of the person designated by the company to interact with government officials; this may be corporate counsel or out-

side immigration counsel. In an investigation, it is imperative that communication with investigators be coordinat-

ed through legal counsel or an appointed company representative. The plan should also include internal communication procedures, such as when to notify management, how to coordinate the release of information internally to the workforce, and how this may affect unions at the facility.

Additionally, unless a warrant has been issued for the release of documentation outside of Form I-9, no further documentation should be released unless reviewed by counsel. All relevant documents must be maintained by the company once notice of inspection is issued. The company will want to maintain confidentiality when possible and control the flow of information. In certain circumstances, determining how to replenish a workforce after an audit may be necessary.

The substantial rise in ICE investigations requires all employers to verify compliance with I-9 verification requirements. Specifically, the I-9s must be properly completed, retained, and stored accordingly, and in a nondiscriminatory manner. Employers who take documented steps to implement I-9 policies and procedures, attend I-9 training sessions, and conduct periodic internal I-9 audits can avoid fines, penalties, and a disruption to their workforce from an ICE investigation. ■

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