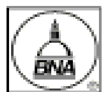

Workplace Immigration Report™

Source: Workplace Immigration Report: All Issues > 2009 > 08/10/2009 > Lead Report > Compliance: Employers Should Focus on Compliance Due to Increased I-9 Audits, Attorneys Say

3 WIR 441

Compliance

Employers Should Focus on Compliance Due to Increased I-9 Audits, Attorneys Say

As the Department of Homeland Security increases the number of I-9 audits and other interior enforcement measures to crack down on the hiring of illegal workers, it is increasingly important for employers to focus on compliance efforts such as internal I-9 reviews, immigration attorneys told BNA Aug. 6.

DHS Secretary Janet Napolitano has repeatedly spoken of a renewed enforcement focus on employers who knowingly violate immigration laws by hiring undocumented workers. In addition, DHS has stepped up the use of I-9 audits and civil fines to combat such unlawful hiring.

"I think every employer should be regularly conducting I-9 audits so that they can identify and correct problems before getting a notice of an ICE audit of the records," immigration attorney Greg Siskind told BNA.

"We have seen clients beginning to show a lot more concern about complying with immigration laws, especially given recent headlines regarding audits and E-Verify mandates," Greg Siskind, founding partner of Siskind Susser, an immigration law firm based in Memphis, Tenn., told BNA Aug. 6.

"I'm counseling employers to take the changes very seriously," he said.

The new enforcement strategy is more of an "incremental change" but it does increase the chance an employer may face an I-9 audit because DHS's Immigration and Customs Enforcement is renewing its focus on this enforcement tool, said Dan Brown, partner in the Washington, D.C., office of the corporate immigration firm Berry Appleman & Leiden LLP, and former director of the Office of Policy and Planning at ICE.

This increase in audits means that employers should focus on the need to keep their I-9 records in top shape, he said.

Employers should be concerned about the increase in I-9 audits, but the central advice to clients remains the same, said Laura Danielson, chair of the immigration department at Fredrikson & Byron in Minneapolis, Minn. "For many years we have advised clients on the importance of doing periodic I-9 and other compliance audits, but now clients are paying much closer attention and we are doing much more audit work," she said.

The attorneys also agreed that signing up for E-Verify, the federal government's electronic employment verification program, is not the answer for every business. In addition, the attorneys discussed the confusion employers face regarding the DHS "no-match" regulation.

ICE to Audit 652 Businesses

On July 1 ICE announced that it was serving notices of inspection to 652 businesses nationwide as part of a new I-9 audit initiative (3 WIR 392, 7/13/09).

The 652 notices of inspection are more than the number of notices ICE issued during the entire 2008 fiscal year, when 503 notices were issued, the agency said.

The notices alert business owners that ICE will be inspecting their hiring records to determine whether or not they are complying with employment eligibility verification laws and regulations. ICE said that

the renewed emphasis on I-9 audits "illustrates ICE's increased focus on holding employers accountable for their hiring practices and efforts to ensure a legal workforce" and is a step in the agency's long-term strategy to deter illegal employment.

The Immigration Reform and Control Act requires that employers complete and retain an I-9 form for all newly hired employees to verify their identity and authorization to work in the United States. The form requires employers to review and record the individual's identity documents and determine whether the documents reasonably appear to be genuine and related to the individual.

Similarly, DHS April 30 issued new enforcement guidelines shifting the department's focus to increase the criminal prosecution of businesses hiring illegal immigrants and lessen the emphasis on workplace raids to pick up undocumented workers (3 WIR 243, 5/4/09). In July, ICE said that the nationwide I-9 audit initiative is a "direct result of this new strategy."

Attorneys Agree Preparation Is Key

"I think every employer should be regularly conducting I-9 audits so that they can identify and correct problems before getting a notice of an ICE audit of the records," Siskind told BNA.

Brown said that focusing on I-9 compliance is more important now than it was when fewer audits were being conducted. There was a "time when dotting the i's and crossing the t's on I-9 forms" was not as important, but clean, error-free I-9s are critical now, he said.

"Virtually every employer will have some I-9 errors," which an internal audit may be able to catch, Brown said.

Brown outlined several common problems found during I-9 audits. One of the easiest to remedy is identifying I-9 forms that have not been completely filled out, and getting the missing information from employees.

"Just be sure when correcting an I-9 that you clearly note when you made the correction so ICE doesn't think you are trying to hide the ball," Brown said.

Other typical I-9 problems include employers who fail to reauthorize workers who have an expired work visa; companies that keep copies of the documents provided to prove work authorization but fail to fill out all of that information on the I-9 itself; and other omissions of data.

"The biggest issue to look for during an I-9 audit is any evidence that the employer knew or should have know they were employing an illegal alien," Brown said. Paperwork errors can generate fines for the company, but unless there is a knowing violation of immigration law those types of problems won't lead to a criminal investigation or charges, he said.

In addition, I-9 audits conducted by a company internally are "extremely helpful in establishing an employer's good faith" if ICE decides to conduct an audit, Danielson said. "Even where there have been violations the government has occasionally decided not to impose fines if has seen earnest measures taken by employers to take I-9 [compliance] seriously, engaging in self-audits and training," she said.

Siskind agreed, stating that "good faith provisions in IRCA that can dramatically reduce fines if companies are proactive in correcting problems on their own before an ICE inspection and self-audits are a great way to identify the problems that need fixing."

"I'm also advising clients to consider using electronic I-9 systems," Siskind said. "These systems can be great tools in preventing errors in the process and can dramatically cut down on the manpower necessary to quickly respond to an ICE I-9 audit request," he said.

In addition to internal I-9 audits, businesses should develop written I-9 policies and procedures that are uniformly practiced and enforced throughout the company, and workers who handle I-9 forms for the company should receive regular compliance training, Brown said.

Tips for Handling an ICE I-9 Audit

The attorneys interviewed offered several tips for how employers should respond ICE chooses to audit their I-9 records.

"The first thing an employer should do is call their immigration lawyer," Siskind said.

When an employer is contacted regarding an ICE audit, ideally it would already have a policy in place to guide employees about dealing with ICE agents. "Employees should have instructions on what company information they should and should not provide to ICE," Danielson said. In addition, a central point of contact from the company should be designated and ICE should also be given the contact information of legal counsel for the company, she said.

Businesses Urged to Be Proactive

Siskind pointed out that typically a notice of inspection gives a business only 72 hours to respond to the audit request. Therefore, it is helpful if an employer "has been proactive and is prepared to respond quickly," he said.

"Employers need to ask themselves well in advance how easy it will be to actually gather all of the physical I-9 files," which may be a problem for some companies, Siskind said.

"Employers will also want to conduct a quick audit of the I-9 records as well to get an idea of what sorts of problems ICE will identify," Siskind said. "This is why conducting a proper self-audit well in advance of an ICE audit can be so crucial," he said.

Brown said that often ICE will grant an extension beyond the 72 hours proscribed by the notice of inspection. "An employer should be up front with ICE about why they need extra time to gather records" and "ICE is usually reasonable and works with the company," he said.

E-Verify Not Universally Recommended

While there are several steps a business can take to comply with immigration laws, the attorneys interviewed by BNA agreed that not every employer should sign up for E-Verify.

Many employers are now required to use E-Verify, either by state law or under the soon to be implemented mandate for federal contractors, but for the remaining employers, "deciding whether or not to sign up for the E-Verify program is a case-by-case determination," Brown said.

"If you do sign up for E-Verify, you are taking on a grater burden than you have to, and I wouldn't normally advise it," he said.

"E-Verify is still not a perfect system and employers also open themselves up for surprise visits and DHS data mining" if they join, Siskind said. "Depending on the company, those concerns may be serious or relatively minor," he said.

Danielson also advised against signing up for E-Verify unless required to do so, and never without making a "careful evaluation of the pros and cons of the program."

She agreed with Siskind that the E-Verify memorandum of understanding between the employer and DHS "gives the government unprecedented access to employee records and information."

Danielson expressed concerns about how the government "will handle this power" because DHS "could use the MOU as a powerful enforcement tool, making the employer wish it had not allowed the government such unbridled access."

However, an employer may wish to consider participating in the E-Verify program if the employer feels it is operating in a "risky industry" that employs many unskilled workers and that it may be a target of an ICE enforcement action, Brown said.

Similarly, the attorneys agreed that the ICE Mutual Agreement between Government and Employers (IMAGE) program, a DHS initiative that promotes best practices to build a legal workforce, is not advisable for most employers.

IMAGE "may make sense for companies that are at high risk of an enforcement action," because those employers who are "trying to demonstrate an extremely high level of compliance with immigration laws might find the burdens of participating in the system a reasonable trade off for the reduction in the risk of an enforcement action," Siskind said.

However, for most employers there "are such strenuous requirements" that it is hard to see "how the benefits outweigh the disadvantages," Danielson said.

Issue of 'No-Match' Remains Unresolved

In addition to I-9 compliance, the attorneys discussed the difficulties faced by employers due to the confusion surrounding the controversial "no-match" regulation.

Under the no-match rule—also called the safe harbor rule—the Social Security Administration would be required to include in no-match letters, sent to employers when employees' Social Security numbers do not match government records, information telling employers that they are required to resolve discrepancies or face liability. The Bush administration initially issued a final no-match rule in August 2007.

On July 8 DHS announced the department's intention to rescind the rule, which was blocked by a court order shortly after it was issued and never went into effect (3 WIR 387, 7/13/09). The next day the Senate passed a $42.9 billion fiscal year 2010 homeland security appropriations bill (H.R. 2892) that included a provision prohibiting the use of appropriated funds for rescinding the no-match rule (3 WIR 390, 7/13/09).

Currently, employers are not required to follow the no-match rule, but "DHS has always said that no-match was not new law, but a clearer statement of what the law already was," Brown said.

It is clear employers should respond to no-match letters by trying to clear up the discrepancies with their employees, Brown said. What is less clear is when an employer is required to terminate an employee who cannot correct his or her records, he said.

Employers Urged to Establish No-Match Policy

"Employers should establish a no-match policy," Brown suggested, that could take into account steps an employee has taken to resolve the discrepancy in their records. "If an employer discovers that an employee is an illegal alien, that employer is required to terminate the employee," but if the only indication is a no-match letter and all of the documents provided to verify work eligibility on the I-9 form are in order, the employer should be hesitant to terminate the worker, he said.

"Employers don't have a lot to worry about regarding no-match letters in the near term," Siskind said. First, the SSA has not issued no-match letters while the rule has been the subject of litigation, he said.

In addition, as long as DHS completes rulemaking by Sept. 30, the Senate bill will have no consequence because "the bill merely says no 2010 budget funds may be used to block or delay the no-match rule, but if the rule is dead before the 2010 fiscal year begins on Oct. 1, the statute will be meaningless," Siskind said.

"Even if the White House is not successful in getting the rule withdrawn by the Sept. 30 deadline, they could also avoid problems by just having SSA not send out the letters," he added.

Brown said that a DHS rule to rescind no-match has already been reviewed by the Office of Management and Budget and will likely be released in the coming week.

Until the no-match issue is completely resolved, Danielson said she is recommending to employers that they "make sure they don't have any old no-match letters lurking about that have never been addressed," because completely ignoring no-match letters "could lead to greater fines and penalties," she said.

By Amber McKinney

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ISSN 1940-1981

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