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Preparing for and surviving the new ICE Age

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Under the Trump administration, U.S. Immigration and Customs Enforcement (ICE) significantly increased its worksite enforcement actions against employers during 2018. From October 2017 through mid-July 2018, ICE opened 6,093 worksite investigations and made 675 criminal and 984 administrative worksite-related arrests.^[1] Behind these numbers is the belief that immigration compliance will protect US workers and jobs. According to Derek N. Benner, executive associate director for Homeland Security Investigations, “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 strengthens public safety and national security.”^[2]

ICE's worksite enforcement strategy focuses on the criminal prosecution of employers who knowingly break the law, and civil fines to encourage compliance with the law. The Form I-9 is the primary enforcement tool of ICE. Federal law requires employers to inspect every employee's evidence of ability to work in the United States and to document that information using the Employment Eligibility Verification Form I-9. All industries, regardless of size, location, and type, are expected to comply with the law. ICE has the authority to inspect employer records to determine whether the employer is in compliance. When employers do not fulfill their immigration compliance obligations, ICE can fine an employer several thousands of dollars for each violation.

I-9 Notice of Inspection

Although ICE might demand to see Form I-9s as part of an immigration inspection, employers should remember that they have rights too. To initiate an investigation, ICE must supply a subpoena in the form of a Notice of Inspection (NOI). At minimum, the employer will have three business days to provide ICE with Form I-9s and related documentation. Although employers have the option of waiving the three-day notice period, it is never advisable to do so. And, depending on the circumstances, it may be possible to extend the three-day period to ensure that the response is properly prepared. Therefore, upon receipt of an NOI, employers should immediately contact an experienced immigration attorney.

At the conclusion of the audit, ICE can issue to the employer a Notice of Intent to Fine, assessing civil penalties for errors on the Form I-9s ranging from \$220 to \$2,191 per violation. For knowingly hiring and continuing to employ unauthorized workers, ICE also can assess civil penalties ranging from \$584 to \$4,384 per unauthorized worker for the first offense; \$4,384 to \$10,957 for second violations; and \$6,575 to \$21,916 for subsequent violations. In determining penalty amounts, ICE considers five factors: size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations.

Dos and don'ts of I-9 compliance

Given the potential for monetary penalties, employers should ensure their I-9 forms and practices are in order. The following is a checklist of I-9 preventive measures.

1. Conduct an internal audit of your I-9 forms and immediately correct any errors or omissions on the forms.
2. Have outside counsel review your I-9 forms and assess your level of compliance and exposure for potential fines and a criminal investigation.
3. Complete I-9 forms if any are lost or missing. Use payroll records to ensure that you have I-9 forms for all required current employees or prior employees.
4. Use the correct version of the Form I-9. As of September 18, 2017, the Form I-9 dated July 17, 2017, is the only acceptable version.
5. Only accept the employee's Form I-9 documents if they are on the I-9's Lists of Acceptable Documents, reasonably appear to be genuine, and relate to the person presenting them. Also, beware of document abuse discrimination. Do not ask employees for specific documents or more documents than you need to complete Section 2 properly.
6. Reverify work authorization documents before they expire and do not allow an employee to continue to work after an expiration date.
7. Do not reverify expired US passports or passport cards, unrestricted Permanent Resident Cards, or identity documents on List B.
8. Do not continue to employ someone who you know is not authorized to work in the US. Seek legal counsel if you have reason to believe an employee is unauthorized to work.
9. Calculate the I-9 purge date when an employee leaves, and purge out-of-date I-9 forms periodically.
10. Conduct training for employees responsible for completing I-9 forms.

Worksite raids

Although an I-9 NOI audit certainly can affect a business and its employees, it is nothing compared to ICE conducting a criminal investigation of a business and executing a worksite raid. Typically, a worksite raid is the result of ICE investigating a business for multiple months and gathering evidence of the employer's noncompliance with immigration laws.

When subject to a worksite raid, employers do not have the three-day notice period that is required in an I-9 NOI audit. When executing a worksite raid, ICE will come to your business unannounced. ICE agents will surround your business, preventing anyone from leaving, and will serve a search warrant. In executing the search warrant, ICE will seize I-9 forms and supporting documents, personnel files, payroll records, bank records, financial records, tax records, and business information. If ICE discovers undocumented workers, they will also detain the workers. Therefore, employers need to be aware of their rights and obligations when ICE does show up.

First, employers should be aware that ICE can enter a public area (e.g., the eating area of a restaurant) without any kind of warrant. If ICE enters a public area and encounters an undocumented immigrant, ICE can take that individual into custody. ICE also may speak to employees in the public area. Employers may inquire as to what is going on, but they cannot interfere with the ICE agents' actions.

Private areas (e.g., the restaurant's kitchen), however, are a different story. Without a judicial warrant, ICE does not have the right to enter private areas or speak to employees. Examine the search warrant to ensure that it is signed by the court and that it is being served within the permitted time frame, and note the scope of the warrant—the area to be searched and the items to be seized. Normally, the scope is quite expansive. Immediately email the warrant to your attorney. The officers sometimes will have ICE warrants, which are agency documents regarding the arrest and detention of an individual, that have not been reviewed by a judge. These warrants carry no legal authority and do not give ICE the right to enter any private areas of the business.

Assign one or two company representatives to follow each agent around the facility. You may videotape the officer and/or record all actions on a notepad. Note any items seized and ask if you may make copies before they are taken. ICE does not have to agree, and if they don't, you will be entitled to secure a copy from the government property lockers. Do not block or interfere with ICE activities. Remain calm and composed, and do not engage in any hostilities toward the agents. Once the search is complete, ICE will continue its investigation of your company's immigration compliance. The investigation could lead to criminal charges against the company's owners, managers, or other employees.

Prepare in advance for an ICE raid

Since ICE will aggressively pursue employers violating US immigration laws, you should take the following actions to prepare for an ICE Form I-9 inspection and worksite raid:

1. Train key employees (e.g., managers, receptionists, or any individual likely to be the initial contact with an ICE agent) on proper procedures and what a company's legal rights are when faced with a request by a government agent for employee records and/or when given a subpoena or warrant.
2. For each location, select a person who will be responsible for notifying headquarters and/or the company's legal representative in the event of a request, a notice of an audit, or an ICE raid and who will coordinate with the ICE agent(s) while on company premises.
3. Prepare a plan of action in the event of an ICE raid, including what steps to follow if a subpoena or warrant is presented, how to coordinate employee interviews, how to handle the ICE agents, and proper ways for employees to conduct themselves during an audit or raid.
4. Develop relationships with employment agencies to supplement the workforce in the event that ICE arrests any employees.
5. Determine whether the company is required by federal or state law to use E-Verify to determine whether newly hired employees are authorized to work in the United States. If not required by law to use E-Verify, evaluate whether your company would like to voluntarily participate in the E-Verify system.

Conclusion

Creating a culture of compliance and periodically reviewing your company's immigration practices is the best way to prepare your company for an immigration investigation and to minimize your legal risks.

Takeaways

- Federal law requires employers to inspect every employee's evidence of eligibility to work in the United States and to document that information using Form I-9.
- ICE must supply a subpoena, and the employer will have a minimum of three business days to provide ICE

with documentation.

- Given the potential for monetary penalties, employers should ensure their I-9 forms and practices are in order.
- Since ICE will aggressively pursue employers violating US immigration laws, companies should prepare for an ICE Form I-9 inspection and worksite raid.
- A culture of compliance is the best way to prepare your company for an immigration investigation and to minimize your legal risks.

¹ U.S. Immigration and Customs Enforcement news release, “ICE delivers more than 5,200 I-9 audit notices to businesses across the US in 2-phase nationwide operation,” July 24, 2018, <http://bit.ly/2Rygu5c>

² Id.

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