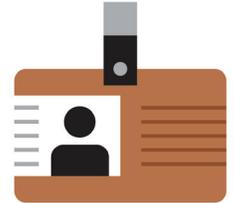




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FOR BNHRA MEMBERS
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MARCH 2018

ICE Form I-9 Compliance Investigations in the Trump Era

Employer liability for Form I-9 violations can range from \$220.00 - \$2,191.00 per Form I-9 with violations.

Last month, the United States Immigration and Customs Enforcement (“ICE”), which is charged with enforcing I-9 Employment Eligibility Verification compliance, raided nearly one hundred (100) 7-Eleven stores across the country, including stores in New York, New Jersey and Pennsylvania. ICE served inspection notices, interviewed employees and management, and made twenty-one (21) arrests. These raids followed acting director Thomas Homan’s recent directive to ICE agents to increase worksite investigations by “four to five times.” To put this in perspective, in 2017, there were 1,360 worksite investigations by ICE, which resulted in businesses being ordered to pay \$97.6 million in judicial forfeiture, fines and restitution, and \$7.8 million in civil fines. A four to five factor increase from 2017 will disrupt thousands of additional businesses. There is no sign that this trend will slow any time soon.

Employers who have not already done so, should implement a strategy to navigate ICE worksite investigations and mitigate related civil fines, forfeitures and penalties. One such strategy that is discussed below involves two prongs: (1) prevention and (2) control.

Prong 1: Prevention Through Knowledge and Compliance

Knowledge of the I-9 Employment Eligibility Verification Form (“Form I-9”) and the related regulations is essential to compliance. Proper completion of Form I-9s will not only help your company avoid an ICE investigation, it will also

mitigate the risk of ICE assessing civil fines, forfeitures and other penalties against your company in the case of an investigation.

When it comes to Form I-9 information and guidance, the United States Citizenship and Immigration Services (“USCIS”) website is a great place to start. USCIS maintains Form I-9, as well as detailed instructions for Form I-9, on its website at <https://www.uscis.gov/i-9>. USCIS also provides an I-9 how-to handbook for employers, free webinars and videos on best practices, and a questions and answers page, at <https://www.uscis.gov/i-9-central>. Further, the regulations governing Form I-9 can be found at 8 C.F.R. § 274a et seq., available online through the Government Publishing Office at <https://www.ecfr.gov>.

The initial step to Form I-9 compliance sounds simple. It is completing the Form I-9 accurately. However, this is no small task given the many nuances of the form and its regulations. Failure to properly complete Form I-9s can subject employers to costly civil penalties and fines. That said, the potential for making mistakes in Form I-9 completion will be significantly reduced if your business uses USCIS’s new “smart” PDF Form I-9, which includes prompts for information and on-screen instructions. Additionally, strictly following Form I-9 instructions and reviewing USCIS’s handbook for employers, as well as its questions and answers page, will further assist in reducing the potential for Form I-9 mistakes.

In addition, businesses should establish an internal process for Form I-9 timing and deadlines. This will reduce the potential for related mistakes. For example, sit down with



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MARCH 2018

new hires on their first day of employment and provide them with the Form I-9 for completion that day (Section 1 of the form must be completed no later than the first day of employment). In addition, make sure that they present proper required documentation within three business days. *See* Form I-9, p. 4. To do so, employers should automatically calendar the three-business-day deadline for employer inspection of employee documentation and completion of Section 2 of the Form I-9. If a new hire presents you with an employment authorization document, such as a Form I-766, automatically calendar the date on which such work authorization expires, to ensure that you timely complete Section 3 reverification.

While following these steps will significantly reduce the potential for Form I-9 mistakes, employers should conduct periodic audits of their Form I-9s and correct all mistakes by carefully following the correction rules contained in USCIS's employer handbook. Legal counsel may be especially helpful in this endeavor. Generally, correction of what are deemed "technical" mistakes, such as employee failure to enter date of birth information or employer failure to enter the date of hire, will serve as a defense to imposition of civil fines and penalties following an ICE audit. On the other hand, correction of "substantive" mistakes, such as employee failure to sign Section 1 or employer failure to review and record proper employee documentation, will generally serve to mitigate any fines that ICE assesses.

Prong 2: Control Through an Action Plan

Having an action plan ready at the time an ICE investigation commences may save your company substantial time and money and help prevent the unnecessary disclosure of confidential or unrelated

information to ICE. To draft an effective action plan, it is necessary to have a thorough understanding of the ICE investigation process.

While ICE does conduct impromptu raids, it is not a common practice of ICE. What is more common is ICE's issuance of inspection notices, through in-person worksite visits or by mail. Generally, a Notice of Inspection will request inspection of Form I-9s for a particular period (and, on occasion, will request supporting documentation, such as payroll records). By law, employers must have a minimum of three business days within which to produce the forms.

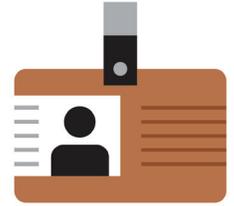
Once the forms have been produced to ICE, ICE conducts an inspection of the forms for compliance. Upon completion of the inspection, ICE will notify the employer of the inspection results. An employer may receive a (1) Notice of Inspection Results if no violation is found; (2) Notice of Suspect Documents if ICE determines an employee is unauthorized to work; (3) Notice of Discrepancies if ICE is unable to determine an employee's or employees' eligibility to work; (4) Notice of Technical or Procedural Failure if ICE identifies technical or procedural violations; (5) Warning Notice if ICE identifies substantive violations, but circumstances do not warrant a monetary penalty; or (6) Notice of Intent to Fine if ICE identified substantive violations. If technical or procedural violations are found, employers are provided ten business days to make corrections. Uncorrected technical or procedural violations become substantive violations.

Your company's action plan should therefore, among other things, (1) anticipate who at the company will be the first person to speak to an ICE officer, should an in-person visit occur (e.g., receptionist), and detail who that person



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MARCH 2018

should contact in the company upon the ICE officer's visit (e.g., Human Resources Manager); (2) identify the person in the company who will receive ICE (or other government agency) communications, and train staff that all such communications should be immediately forwarded to that person; and (3) identify legal counsel to call for guidance and/or questions relating to ICE communications. The company representative selected to engage with ICE officers in person should be prepared to engage in a conversation with the ICE officers, asking the officers, among other things, why they are visiting, what they are looking for, when they are looking for it, and whether an extension of time is possible, if necessary.

Furthermore, as best practices:

- (1) Form I-9s should be maintained in an accessible location and separately from employee personnel files, for ease of access;
- (2) Employers should not attach photocopies of identification documents to Form I-9s, unless the photocopies of identification documents are attached to Form I-9s for all employees, so as to avoid any suggestion of disparate treatment; and
- (3) Form I-9s should be destroyed by employers following the later of three years after an employee's date of hire or one year after the date employment is terminated, so that these Form I-9s are not inadvertently produced to ICE pursuant to a Notice of Inspection.

Should ICE issue a Notice of Intent to Fine, ICE will provide supporting charging information specifying the violations. The employer may negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer ("OCAHO") within thirty (30) days of service of the Notice. While an employer may decide to independently review ICE's charging documents and represent itself in settlement negotiations with ICE, it is strongly recommended that employers retain experienced legal counsel for representation in proceedings before OCAHO, where legal arguments submitted before OCAHO could mean the difference between an assessment of the full amount of civil fines or penalties and a reduced assessment of fines or penalties.

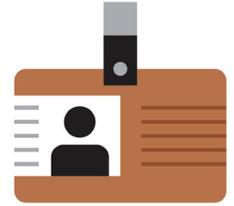
Ultimately, as the current administration has vowed to crack down on illegal immigration, employers will see an increase in ICE investigations. With a short turnaround time to comply with ICE Notice of Inspections, it is critical for employers to have an action plan in place and to properly complete and audit their Form I-9s.

Additional Assistance

Should you have any questions regarding Form I-9 compliance, please contact any of the attorneys on our Labor & Employment Practice Team. ■



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