

Immigration Enforcement: Government Increases Efforts to Curb Illegal Employment of Immigrants

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Businesses big and small across the United States have experienced a significant increase in immigration-related compliance audits, raids, visits, fines and prosecutions related to immigrants in the workplace. The preliminary statistics for 2011 are indicators that this year, U.S. Immigrations and Customs Enforcement (ICE) will perform more audits, conduct more raids, generate more fines and engage in more prosecutions than ever before.

In 2002, there were 25 criminal arrests resulting from worksite enforcement actions. In 2008, ICE made over 1,100 arrests directly tied to the enforcement of immigration laws in the workplace. In 2010, ICE reported that they opened 2,746 worksite enforcement investigations, imposing approximately \$50 million in financial sanctions and collecting nearly \$7 million in fines.

ICE AUDITS

ICE audits are so prevalent among certain targeted U.S. industries that in January, ICE Director John Morton announced the establishment of a wholly dedicated auditing unit to support ICE's worksite enforcement strategy by helping the ICE field offices expedite the audits they perform. The Employment Compliance Inspection Center (ECIC) established in Crystal City, Va., flanks ICE headquarters and investigates businesses to ensure compliance with employment verification procedures and U.S. immigration laws.

There is little doubt that to most politicians sensitive to constituent inquiries, immigration enforcement is a popular position. Constituents supporting enforcement of immigration laws want to hear about deportations, removals, arrests and fines.

Although the current administration supports immigration reform in theory, this is no different from the previous administration's position. Congress, however, appears consistently interested in focusing efforts on further immigration restriction. A long-struggling economy, particularly in the employment sector, also generates support for enforcement-related actions.

A CAREFUL BALANCING ACT

Any targeted employer may have to deal with field investigation visits and legal surveillance of their business by U.S. Citizen and Immigration Services (USCIS) as well as ICE visits, audits or raids and Department of Labor visits. At the same time, these employers must balance antidiscrimination laws, fair hiring practices, Equal Employment Opportunity Commission visits and the possibility of an investigation by the Office of Special Counsel for Immigration-Related Unfair Employment Practices enforcing the antidiscrimination provision of the INA § 274B, 8 U.S.C. 1324b.

This is the massive dilemma that employers now face. Employers used to fear visits from the IRS, whereas visits from the legacy "INS" were rarely heard about. In 2010 and 2011, visits related to immigration-related employment laws have become almost as common as IRS audits. The hiring of federal employees to enforce these laws has been massive. These employees are expected not only to educate the public and enforce the immigration laws, but also to generate fines that help justify their existence.

This article attempts to explain employers' requirements with reference to employment documentation and the balance they must reach to avoid prosecution or accusation of unfair hiring practices.

In order for an employer to avoid or survive an I-9 employee verification audit, ICE visit or USCIS Field Examination Program visit, it is crucial that the hiring department be knowledgeable about hiring laws, employment fair practices and I-9 verification processes.

I-9 VERIFICATION

Employers must verify that an individual they plan to hire or continue to employ in the United States is authorized to work here. The best way to go about doing this in the right order, referencing the correct documents in compliance with U.S. immigration laws, is to have the hiring person-in-charge trained properly or regularly visit the USCIS government portal (www.uscis.gov). This extremely helpful tool provides step-by-step handbooks for employers, with specific instructions for completing Form I-9 to verify employment eligibility.

The "USCIS Handbook For Employers" explains in simple text exactly why employers must verify employment authorization and the identity of new employees, in addition to re-verification processes, I-9 retention requirements, and penalties for unlawful discrimination or prohibited practices.

Best practices related to I-9 retention, re-verification and even termination are suggested within the Handbook For Employers. It is extremely important for HR directors and others who handle I-9s to become familiar with this handbook and the best practices referenced therein.

EMPLOYER STANDARD

The USCIS states that employers are not required to be document experts. Employers must accept documents that reasonably appear to be genuine and related to the person presenting them. Employers are judged by the USCIS, ICE and our federal courts by a "knew or should have known" standard. If a new employee provides a document that does not reasonably appear to be genuine, the employer must reject that document and ask for others that satisfy Form I-9 requirements.

In order to stay in I-9 compliance, employers should do the following:

- Educate and retrain recruitment personnel or find a knowledgeable immigration attorney to do so;
- Put employment verification and related document preparation and retention in the hands of one well-trained person or, if necessary, more than one person who is in regular and steady communication with others in their department in case of a visit or raid;
- Establish an electronic I-9 implementation or verification system; and
- Consider the E-Verify system enrollment offered by the USCIS, especially if compliance with hiring or immigration laws has presented a problem in the past.

EMPLOYEES' OBLIGATIONS

No alien may accept employment in the United States unless they have been authorized to do so. Some aliens may have employment authorization, including individuals admitted as permanent residents, asylees or refugees, as well as work visa holders or their spouses. Other aliens need to apply individually for employment authorization.

Many aliens in the United States who entered illegally, overstayed visas or engaged in fraud in the obtaining of initial paperwork to enter the United States may have no authorization potential even if they apply. This, however, rarely stops prospective employees with fraudulent documents from attempting to gain employment.

Proper training of human resources personnel in the I-9 procedure and examination of documents is crucial for success in weeding out these unauthorized workers.

ICE VISITS, I-9 AUDITS

The document I-9 itself can be confusing, but is not complicated. Problems often arise when various individuals at the same company or individuals with a lack of training are placed in charge of performing the I-9 verification process. Audits related to I-9 documents presently number in the thousands nationwide. Typically, employers receive three or more days' notice of

an I-9 inspection. These notices are not necessarily received in writing and often result from a quick site visit or even a phone call. During the notice period, the employer has the opportunity to review and even repair I-9s.

The recommended best practice is to gather the documentation requested by the auditor and if found to be deficient, attach an updated I-9 to the deficient one. This practice can avoid any accusation of fraud related. Typically, notices of inspection will request certain documents, including the original I-9, current and past employee lists, payroll documents, W-2s and corporate documents.

ICE officers will then pick up these documents, at which time questions may be asked. Employers should always be represented by counsel and request an inventory log of what has been provided.

During raids, which are different than inspections in that no notice is given, typically the USCIS, ICE or the Department of Justice has already engaged in an investigation and documents will often be seized, hard drives imaged and businesses disrupted while the government gathers materials to build its case related to unlawful employment or unlawful hiring procedures.

POST-INSPECTION OR RAID

After inspections, ICE will determine through cooperation with the U.S. attorney whether or not to issue a Notice of Intent to Fine (NIF) for paperwork deficiencies; knowingly hiring unauthorized or undocumented aliens; continuing to employ undocumented or unauthorized aliens once the employer became aware of their undocumented or unauthorized status; or refusal to cooperate with the investigation and provide I-9s and the requested documents in a timely fashion.

Although visits and audits are typically swift, determinations related to the examination of those documents as to whether fines will be issued or prosecutions will occur often take months.

AVOID ACCUSATIONS OF BAD HIRING PRACTICES

Balancing of anti-discriminatory hiring practices, screening practices or terminations is key when attempting to comply with all employment authorization laws. INA § 274B, 8 U.S.C. 1324b prohibits discrimination in hiring, firing, recruitment or referral for a fee that is based upon an individual's national origin or citizenship status. The statute also prohibits unfair documentary practices during the employment eligibility verification process, known as I-9 document abuse. Unfortunately, for reasons related to poor training, refusals to learn the I-9 verification process or outright discriminatory hiring practices, many employers have been investigated, fined or sanctioned by the Office of Special Counsel for Immigration-Related Unfair Employment Practices over the past year.

Colleges, fast food restaurants, staffing services, manufacturers and fine dining establishments have all elected to settle with the United States Justice Department in 2011 for civil penalties and

back pay for violations of this provision. Many have had to engage in government re-training of their hiring personnel and complete alteration of their hiring practices.

The USCIS reports that John Jay College, Maricopa County College, Restwend LLC (a large Wendy's franchisee), Hoover Inc. and Morton's of Chicago/Portland Inc. have all been subject to civil penalties and back pay responsibility for alleged unfair hiring practices during this sensitive era. These employers were likely caught in the balance between becoming knowledgeable about proper training of hiring personnel and I-9 verification processes and discriminatory hiring practices.

TAKE PROACTIVE STEPS NOW

Proper screening and hiring procedures, as well as document retention, are key to compliance. These are also the key to a successful response to an audit, the survival of an ICE raid and the avoidance of fines and prosecutions. Regardless of the employer's level of compliance in the past, they have the ability to easily learn the requirements of the USCIS and federal laws and fix their hiring practices, retrain their personnel and even recomplete I-9s to protect themselves from liability.

Such opportunities, similar to the ability to amend a company tax return when an error is discovered, should not be ignored. To simply wait and hope that your business will not be to examine your hiring practices, employment verification documents or retention practices is a gamble with terrible odds. •

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