



Put on ICE: Protecting Your Organization from Increased Immigration and Customs Enforcement

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U.S. Immigration and Customs Enforcement ("ICE") is the investigative arm of the U.S. Department of Homeland Security. Its primary mission is to enforce federal laws governing border control, customs, trade and immigration. Created in 2003, ICE is a relatively new agency but is also one of the largest, with more than 20,000 employees in offices in all 50 states and 48 foreign countries, and an annual budget of more than \$5.7 billion.

Since its inception, employers have become familiar with ICE through its enforcement of Section 274A(b) of the Immigration and Nationality Act ("INA"), which requires employers to verify the identity and employment eligibility of all individuals hired in the United States. In order to document this verification, employers must use the Employment Eligibility Verification Form I-9 ("Form I-9"). Employers have come to dread ICE audits and enforcement actions because they are notoriously rigid and monetary penalties can be severe, even for minor errors. (In 2010 alone, ICE conducted I-9 audits of 2,196 U.S. companies and collected nearly \$7 million in fines!) To be in the best position to avoid or, if necessary, comply with an ICE audit, employers should have a solid understanding of worker eligibility verification requirements as well as what to expect if faced with an ICE audit.

Increased I-9 Audits and Immigration Enforcement. The creation of ICE has substantially increased U.S. immigration enforcement and penalties for employers. ICE has taken the position that each employer is not only responsible for ensuring that its workforce is made up of authorized workers, but also that the internal systems it uses results in stringent compliance with the INA. Practically speaking, this means that an employer may be subjected to large fines even if it makes every effort to comply but falls short of precise compliance. For example, in late 2010, ICE's investigation of clothing retailer Abercrombie & Fitch's Michigan stores uncovered "technology-related deficiencies" in Abercrombie & Fitch's I-9 verification system. Although ICE reported that "the company was fully cooperative during the investigation and no instances of the knowing hire of unauthorized aliens were discovered," Abercrombie & Fitch eventually paid a \$1,047,110 fine settlement.

ICE audits and investigations typically focus on whether the employer has committed any "technical" or "procedural" violations but may uncover "substantive" violations. Examples of technical violations include: (1) failure to ensure an individual provides addresses or birth dates; (2) failure to ensure an individual provides his or her alien number; and (3) failure to indicate whether the employee has a disability or is under age 18. Examples of substantive violations include: (1) failure to ensure that the individual provides his or her printed name where indicated; (2) failure to date the form where indicated; (3) failure to ensure the individual checks a box attesting to whether s/he is a citizen or national of the United States; and (4) failure to complete the I-9 form within three days of an employee's date of employment. Unlike technical or procedural violations, an employer does not have the opportunity to correct substantive violations, which result in the highest fines.

The I-9 Audit: What to Expect. An employer selected for an audit will initially receive a Notice of Inspection ("NOI") from ICE compelling production of its I-9 Forms. The timeline for producing these forms is only three business days. In addition, the NOI will often request various forms of supporting documentation, such as a list of current employees and copies of the employer's payroll, business license and corporate formation documents.

Following production of these materials, ICE agents will inspect the documents to determine whether the employer has committed any technical or procedural violations. If ICE determines that such violations exist, an employer is allowed 10 business days to make corrections. Even so, ICE may assess monetary penalties against the employer for all substantive and uncorrected technical violations. Substantive violation penalties range from \$110 to \$1,100 per violation. Penalties for knowingly hiring/employing unauthorized workers range from \$375 to \$16,000 per violation. Employers that knowingly employed unauthorized workers can also be criminally prosecuted and/or barred from participating in federal contracts or receiving other government benefits. In 2010, ICE criminally charged a record-breaking 180 business owners, employers, and managers in connection with worksite investigations.

Avoiding I-9 Employment Law Issues and Fines. It should come as no surprise that the best way to prevent ICE-related problems is to properly complete and maintain I-9 Forms. "E-Verify," a free Internet-based system that allows employers to determine the eligibility of their employees to work in the United States, is the best tool for ensuring worker authorization. Alternatively, employers may use the Social Security Number Verification Service, available online through the U.S. Social Security Administration, to verify the names and social security numbers of their current workforce and identify any discrepancies. Employers can also take advantage of a new ICE program called "IMAGE." IMAGE is a voluntary program in which businesses partner with ICE to protect themselves from employee use of fraudulent identity documents.

Employers must additionally comply with ICE's retention policies, which require employers to retain the original I-9 Forms: (1) of all current employees; and (2) of former employees for a period of at least three years from the date of hire or for one year after the employee is no longer employed, whichever is longer. Employers should establish a written hiring and employment eligibility verification policy and require that the I-9 Form process be conducted by individuals with appropriate training.

If faced with an ICE audit, employers should make every effort to comply with the investigation. A good faith effort to comply is a factor that can reduce an assessed penalty. If ICE discovers substantive and/or technical violations in an employer's I-9 Forms, it may issue a Notice of Intent to Fine letter. An employer will have 30 days from receipt of that letter to negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer. Attempting to reach a settlement with ICE is a good option for employers, particularly where the contemplated fines are substantial and the employer exhibits intent to take an aggressive approach toward future compliance.

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