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The Fine Art of Employment Law: From Compliance to the Courtroom

Surrealism: The Strange World of Immigration-related Governmental Audits

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Immigration & Customs Enforcement

- Responsible for enforcement of Form I-9 Compliance
 - I-9 Audits
 - Worksite Raids
 - Issuance of Fines
 - Arrests



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U.S. Immigration and Customs Enforcement's Homeland Security Investigations

- Enforces the law and engages in effective worksite enforcement
- Reduces the demand for illegal employment
- Protects employment opportunities for the nation's lawful workforce.



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Homeland Security Investigations

- Investigations are based on leads and tips obtained from a variety of sources
- HSI prioritizes investigations involving critical infrastructure and key resources
- No industry regardless of size, type or location is exempt from complying with the law or being the subject of an HSI investigation.



ICE Enforcement Efforts - 2013

Department of Homeland Security's worksite enforcement guidelines for Immigration Customs & Enforcement (ICE) shifts focus from illegal foreign worker to employer that hired worker.

- Served 3,127 NOIs & 637 Final Orders
- \$ 15,808,365 in administrative fines
- ICE made 452 criminal arrests tied to worksite enforcement investigations
- ICE debarred 277 businesses and individuals for administrative and criminal violations
- No industry is exempt from complying with the law or being the subject of an Homeland Security Investigation

Record Breaking Spending on Immigration Enforcement

- The Administration spent more on immigration enforcement in FY 2012 than on all other federal criminal law enforcement combined, with an estimated \$18 billion in expenditures.
- Surpassed the combined budgets of the FBI, ATF, DEA and Secret Service by \$3.6 Billion.



What Can ICE Request?

- I-9s for current employees hired after November 6, 1986
- Electronic employee listing
- Quarterly wage and hour reports
- Payroll data
- SSA, E-verify, SSNVS correspondence
- Business owner information (Employer ID number, owner's SSN/address, business licenses, etc.)



ICE Arrives – Notice of Inspection

- A Notice of Inspection provided three days prior to ICE review of I-9 Forms is allowed (Employer may waive this notice period, but not recommended).
- Original, microfilm, microfiche, or electronic I-9 forms are acceptable for inspection.
- Personal appearance to give testimony and turn over documents may be required.
- Subpoena/warrant is not required for an I-9 Inspection.

ICE Arrive – No Notice of Inspection

- 3 days prior notice is allowed by law.
- Do not be persuaded to waive 3 day notice.
- Insist on written notice of inspection.
- ICE may not come back.



What if a Search Warrant is presented?

- No three day notice required
- Review search warrant
- Monitor the search but do not interfere
- Comply with terms of Warrant
- Do not resist.
- Notify/contact management and legal counsel immediately
- Keep track of what is seized.



Providing Forms to ICE

- Notice of Inspection requires employer to produce documents for review.
- Review may be at employer's location or at ICE office.
- May, but not required to, turn over originals or copies of I-9 forms to ICE
 - may insist on inspection in presence of company representative.



Be Prepared for an ICE Raid

- Establish procedures if a warrant presented.
- Ensure supervisors know who to contact.
- Designate a point person in each location to document all aspects of the raid.
- Prepare employees for possible raid.
- Be prepared to address media during and after raid.

Location of I-9 Forms

- Inform ICE immediately if forms are maintained at a different location
- Make arrangements for inspection at the location where the forms are maintained
- Provide information to ICE in writing as proof of cooperation/good faith.



After the ICE Inspection

- ICE issues Notice of Inspection Results if the employer is in compliance.
- If the employer is not in compliance, the employer may receive:
 - Notice of Technical or Procedural Failures
 - Notice of Intent to Fine
 - Notice of Suspect Documents
 - Notice of Discrepancies



Notice of Intent to Fine

- Employer has opportunity to negotiate settlement or request hearing.
- ICE will access fines for:
 - Substantive Errors
 - Uncorrected Technical Errors
 - Social Security card marked "Not Valid for Employment" is not acceptable List C document.
- Fine Assessment
 - History of I-9 Violations
 - Size of Company
 - Types of Errors
 - Unauthorized employees
 - Good Faith compliance
 - Use of E-verify



Monetary Penalties

- I-9 substantive/uncorrected technical violations range from \$110 to \$1,100 per violation
- Knowingly hiring or continuing to employ an unauthorized worker violations range from :
 - \$375 - \$3200 (1st violation)
 - \$3200 - \$6500 (2nd violation)
 - \$4300 - \$16000 (3rd violation)



What to Do with a NOIF?

- Fight it or pay it?
 - Small Amount?
 - Overriding Reason for Appeal?
- Administrative Law Judge Hearing
 - Must Request within 30 days of NOIF



Administrative Law Judge Hearing

- Employer is allowed to provide testimony
- May see reduction in fine amount/per form fine
- Settlement



Criminal Penalties

- 10 years and/or \$250,000 fine for harboring, smuggling, concealing, or transporting illegal aliens for financial gain.
- Criminal sanctions for conspiracy to harbor, smuggle, conceal, or transport.



U.S. Department of Justice

- Charges of Discrimination
 - I-9 Violations
 - Citizenship Status
 - Immigration Status
 - National Origin
 - Retaliation
 - E-Verify Violations



USDOJ – Charges of Discrimination

- Process
 - Complaint Driven
 - Interviewing Witnesses
 - Discovery
 - Settlement
 - Training, Posting Requirements
 - Monetary Fines
 - Private Right of Action



IRCA Prohibited Acts

Cannot:

- Knowingly hire an alien who is not authorized to work
- Hire any individual without verifying identity and work authorization
- Continue employing person if you know or should know the person is not authorized to work.

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Unfair Documentary Practices

- Do not require specific documents or combination of documents.
- Do not require more or different documents than minimally required.
- Do not refuse to accept documents that reasonably appear to be genuine.
- Employee's choice which of the acceptable Form I-9 documents to present.

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US Department of Labor – Wage and Hour

- H-1B Investigations
 - Public Access Files
 - Labor Condition Application
 - Notification of Termination
- H-2B Investigations
 - Scope of employment
 - Date of Need
 - Notification of Termination



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U.S. Citizenship and Immigration Services

- H-1B Audits
 - Site visits
 - Review Payroll
 - Interview Employee & Supervisor
- Results
 - Possible visa revocation
 - Debarment



IMAGE Program

- ICE Mutual Agreement between Government & Employers
- Assists employers in targeted sectors develop a more secure and stable workforce
- Employers seeking certification in IMAGE must:
 - Complete the IMAGE Self-Assessment Questionnaire (Application)
 - Enroll in the E-Verify program within 60 days
 - Establish a written hiring and employment eligibility verification policy that includes an internal Form I-9 audit at least once a year
 - Submit to a Form I-9 Inspection
 - Review and sign an official IMAGE partnership agreement with ICE



Protect Your Business

- I-9 Audit may be foundation for raid, civil monetary penalties and criminal sanctions.
- Ensure I-9 and E-Verify compliance programs are in place, up-to-date, and followed.
- Conduct regular internal I-9 audits and remedy identified errors.
- Have outside counsel conduct periodic I-9 audits.



Self-Audit: Getting Started

- Generate a list of all current employees.
- Pull I-9 forms for all current employees.
- Make a note on the list if an I-9 form is missing for a particular employee.



Self Audit – Review Form

- Review each I-9 form for errors.
- Use “stick-on” notes to highlight errors.
- Things to look for:
 - Missing information
 - Incomplete listing for documents
 - Signatures in Sections 1 and 2
 - Section 1 – Status Box Checked
 - Too many documents in Section 2
 - Was the correct version of the form used?



Retention Requirements

- Once an employee is terminated, you must retain I-9 form for:
 - At least three years from date of hire; and
 - At least one year from date of termination;
 - Whichever is later.
- Once retention requirements met, purge form.



Things to Remember

- U.S. passports, U.S. passport cards, Permanent Resident Cards, or List B Identity documents should not be re-verified.
- As of April 3, 2009, expired documents may not be accepted (unless they have been automatically extended – such as Temporary Protected Status).
- Social Security card marked “Not Valid for Employment” is not acceptable List C document.



Making Corrections

- Correct errors, as allowed, on each form.
 - Section 1 – Employee makes corrections.
 - Section 2 – Employer makes corrections.
- Strike through errors – do not use White Out or Liquid Paper.
- All corrections should be initialed, dated, and include the words “Per Self Audit”.



Missing Form I-9

- If you determine that an I-9 form is missing for a current employee – complete a form immediately.
- Ask employee to complete Section 1, sign and date (with current date).
- Complete Section 2 (insert original start date) and sign and date (with current date).



Final Questions

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Thank You!

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