The Federal Government and Immigration Enforcement in 2010: I-9 Audits, Site Visits and a Big Push for E-Verify

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The Obama administration's Immigration and Customs Enforcement (ICE) under the leadership of Secretary of Homeland Security Janet Napolitano implemented a bold new worksite enforcement strategy and shifted the focus onto employers in 2009. The result was immediately noticeable, and a new era of stricter corporate compliance means the business community should now be on guard and expect an increase in I-9 audits, employer recordkeeping audits, unannounced site visits, and a big push for E-Verify for use by employers in 2010.

The prior administration's worksite enforcement policy focused more on illegal workers than the employers who employed them – but times have changed especially in response to the downturn in the economy and the increasing unemployment rate in the U.S. Now, the focus is the criminal prosecution of employers for knowingly violating immigration laws in their employment practices. This stepped up enforcement includes attention to I-9 document compliance and the far more serious crimes of trafficking, smuggling, and harboring illegal immigrants.

New Worksite Enforcement Strategy

On April 30, a memo outlined a detailed manifesto of ICE's worksite enforcement strategy.

The goals of the new strategy are to penalize employers who knowingly hire illegal workers, deter employers who are tempted to hire illegal workers, and encourage all employers to take advantage of compliance tools. The compliance tools, such as E-Verify, aid employers in determining whether an employee is authorized to work.

Under the new strategy, one of ICE's main priorities is the criminal prosecution of employers who violate immigration laws and employ individuals unauthorized to work. Department of Homeland Security (DHS) Assistant Secretary for ICE John Morton stated that "ICE is focused on finding and penalizing employers who believe they can unfairly get ahead by cultivating illegal workplaces. We are increasing criminal and civil enforcement of immigration-related employment laws and imposing smart, tough employer sanctions to even the playing field for employers who play by the rules."

ICE is executing the new strategy under the belief that enforcement efforts focused on employers better target the root causes of illegal immigration. According to ICE

statistics, "in 2008, worksite enforcement resulted in more than 6,000 arrests, but only 135 were employers." Under the new enforcement strategy, it is expected that more employers will face criminal prosecutions and civil fines for employing individuals unauthorized to work in the U.S.

According to the new enforcement strategy, ICE will continue to arrest and initiate removal proceedings for illegal workers. However, the arrest of employees will be secondary to the investigation of their employers. ICE plans to have indictments, criminal arrests or search warrants, and a commitment to prosecute the targeted employer before arresting employees for immigration violations at the worksite.

Recent ICE investigations - High Fines/Penalties

In July, the Krispy Kreme Doughnut Corporation agreed to pay a $40,000 fine for I-9 violations. ICE audited Krispy Kreme's I-9 forms after receiving reports that the company was employing illegal workers at an Ohio factory. In addition to paying the fine, the company has agreed to revise its immigration compliance program and implement procedures to ensure compliance with immigration laws.

In August, the Shipley Do-Nut Flour & Supply Company, Inc. in Houston, Texas, received a criminal fine of $250,000, court supervision for three years and forfeited $1.334 million for harboring unauthorized workers. During the investigation, ICE arrested 27 illegal workers and recovered 42 Social Security Administration No-Match letters regarding the workers' Social Security numbers.

Also in August, two corporate directors/managers at Yamato Engine Specialists in Bellingham, Washington, pleaded guilty to aiding and abetting the use of a false statement on immigration employment forms. The corporate officers admitted knowing that the workers at their family-owned company used false names and Social Security numbers on I-9 forms. During the investigation, ICE found 28 employees working unlawfully at the business. The company is expected to pay a significant fine in connection with the case.

No-Match Rule Rescinded

In October, DHS issued a final rule rescinding the No-Match regulation. The No-Match rule established safe-harbor procedures for employers to follow if they received a Social Security Administration (SSA) No-Match letter. SSA no-match letters are sent to employers when an employee's name and Social Security Number provided on a W-2 earnings report do not match SSA records.

Since its issuance in 2007, the No-Match rule has been plagued with controversy and legal battles and was never implemented. Although the No-Match rule was rescinded, employers receiving no-match letters should continue to take reasonable steps to resolve the discrepancy and correct their records.

Instead of moving forward with the No-Match rule, DHS announced in a statement that it will focus its enforcement attention on the use of the E-Verify database system as the mechanism for preventing the employment of individuals not authorized to work in the U.S.

E-Verify

In late October, President Obama signed a $42.8 billion fiscal year 2010 homeland security appropriations bill (H.R. 2892) that included a three-year extension of E-Verify and $137 million toward operation improvements for compliance and accuracy.

Although no mandatory requirement was included in the bill, there is clear support to expand E-Verify as indicated in the Federal Acquisition Regulation requiring certain federal contractors to use E-Verify. Starting in September 2009, certain federal contractors were required to begin using E-Verify based on federal contracts of $100,000 and four months in duration and subcontracts flowing from the principal contract for services of at least $3000.

At a DHS meeting in late November, Secretary Napolitano, ICE and U.S. Customs and Immigration Services (USCIS) announced an E-Verify campaign that will recognize companies using E-Verify to encourage consumers to support those companies. About 170,000 out of 7 million employers use E-Verify.

The "I E-Verify" campaign includes a public service television advertisement to announce the companies enrolled in E-Verify. DHS stated that E-Verify confirms 96.9 percent of queries as work-authorized within seconds. DHS also stated that only 0.3 percent resulted in a loss of job for workers due to inaccuracies in the system.

I-9 Notices of Inspection

The Form I-9 Notice of Inspection is considered the most important administrative compliance tool that ICE has available.

Under the new worksite enforcement strategy, ICE is using Form I-9 Notices of Inspection as the main mechanism to determine whether employers are in compliance with immigration laws. Since implementing the new strategy in April, ICE has issued 1,652 Notices of Inspections to businesses, which is a remarkable increase when compared to the 503 notices issued in 2008.

In July, ICE issued Notices of Inspection to 652 businesses. At that time, Assistant Secretary John Morton stated, "ICE is committed to establishing a meaningful I-9 inspection program to promote compliance with the law." Mr. Morton referred to the auditing of 652 business's I-9 forms as "only the first step in ICE's long-term strategy to address and deter illegal employment."

Another round of I-9 Notices of Inspection occurred on November 19, 2009 when ICE issued Notices to 1,000 more employers nationwide.

The Notices of Inspection require employers to allow ICE to inspect their I-9 forms to determine compliance with employment eligibility verification laws. Once served with a Notice of Inspection, employers are generally given three days to provide their I-9 forms to the government for review. In general, employers have been asked to turn over I-9 forms for all current and recently terminated employees. However, some employers are being required to turn over I-9 forms for all employees since November 6, 1986, when the I-9 form requirement was instituted under the Immigration Reform and Control Act (IRCA). In addition to I-9 forms, employers are being asked to turn over payroll documentation and copies of any documentation employees provided during the I-9 form completion process.

According to ICE, the businesses targeted in these nationwide audits have been selected as a result of specific leads and information obtained by the agency. ICE is also targeting private businesses in areas critical to the nation's infrastructure, public safety and national security.

Worksite Enforcement Statistics

As a result of the 654 Notices of Inspection issued in July, ICE has already reviewed over 85,000 I-9 forms and identified over 14,000 suspect documents. Although ICE is not finished reviewing all the I-9 forms, ICE has already issued 61 Notices of Intent to Fine, and $2,310,255 in fines. Additionally, ICE has closed 325 cases for businesses that were either found to be compliant or were issued a Warning Notice. Currently, there are 267 cases still being considered for Notices of Intent to Fine.

Since the new enforcement strategy was implemented on April 30, ICE has reported a dramatic increase in enforcement activity when compared to enforcement activity in 2008. ICE has reported the following statistics:

- 142 Notices of Intent to Fine totaling $15,865,181
  - 32 Notices of Intent to Fine totaling $2,355,330 were issued in FY 2008
- 45 Final Orders totaling $798,179
  - 8 Final orders totaling $196,523 during the same period in FY 2008
- 1,897 cases initiated
  - 605 initiated during the same period in FY 2008
- 1,069 Form I-9 Inspections
  - 503 Form I-9 Inspections in FY 2008

What to Expect in 2010 - No cooling off for ICE

In 2010, ICE is expected to continue its quest to aggressively pursue employers who knowingly employ individuals unauthorized to work and who abuse the immigration system for their personal gain. ICE will continue to issue I-9 Notices of Inspection,

levy administrative fines, and pursue criminal prosecution against employers violating the law.

Employer Site Investigations for H-1B employers:

After a 2008 internal study that revealed as many as 21% of H-1B petitions were defective in some way, the USCIS quietly changed the H-1B I-129 form instructions to authorize the release of any information from company records. Agency verification and review of H-1B and other visa petitions and related public records are underway. 40,000 site visits are expected under the Administrative Site Visit and Verification Program, an estimate from the American Immigration Lawyers Association based on the number of case transfers to the unit for investigation. The site visits are unannounced and cooperation is voluntary, although companies should generally cooperate and seek legal counsel during the site visit if possible.

Employers must review their H-1B public access files and other employment related information since a site visit could open up scrutiny from other agencies including the Department of Labor, the IRS, and OSHA. The employer must be paying the H-1B prevailing wage and assign the employee to the location and duties indicated in the petition and the labor condition application (LCA). LCA violations found in an audit can result in monetary damages. Fines start at $1,000, move to $5,000 for willful violations and can reach up to $35,000 and include debarment from future sponsorship for a period of time plus back pay when a U.S. worker is displaced.

Immigration Reform debate

In addition to continued worksite investigations in 2010, the debate over comprehensive immigration reform will continue. Congress was unable to pass comprehensive immigration reform in 2007. However, the Obama administration has continued to emphasize its commitment to overhauling the immigration system and we expect to see comprehensive immigration reform legislation introduced in 2010. However, some observers speculate that unless the economy rebounds, comprehensive reform won't pass, but some piecemeal legislation might make it through Congress.

In a November 13 speech, Secretary Napolitano described the framework for comprehensive immigration reform as a "three-legged stool" that must include:

- a commitment to worksite enforcement and border security,
- an improved visa system for families and workers to live and work in the U.S., and
- a solution for those people already in the U.S.

It is clear that worksite investigations will continue next year as part of ICE's worksite enforcement strategy and as part of any comprehensive immigration legislation that is passed.

Proposed legislation to overhaul the H-1B and L-1 visa programs and increase restrictions remains in congressional committee. The Visa Reform Act (S.887) by Sen. Charles Grassley (R-Iowa) and Assistant Senate Majority Leader Richard Durbin (D-Ill.) seeks to increase restrictions and oversight of nonimmigrant professional visas.

State laws regarding various requirements for compliance are expected to increase. Arizona's E-Verify law remains the broadest of state immigration laws which requires all employers to use the DHS E-Verify employment verification system or face loss of their business license. The law has been challenged as to its constitutionality and was confirmed by a Ninth Circuit decision but now faces possible review by the U.S. Supreme Court. Any ruling could have far-reaching impact on many state laws requiring use of E-Verify by employers.

As companies are being encouraged to enroll in online verification, we expect an increased use of database systems such as E-Verify, Social Security Number Verification System (SSNVS) by the Social Security Administration, electronic I-9 form systems and background checks.

Here's an important caveat to employers who use electronic verification without proper training; misuse can lead to verification-related discrimination, illegal pre-screening and premature termination. Employers can face civil penalties for refusing to hire an individual based on their foreign or immigration status. 8 USC Sec. 1324b prohibits national origin discrimination during the employment process. To combat verification discrimination, employers and employees should be educated on their rights and responsibilities, as recently pointed out by Margaret Hu, Special Policy Counsel in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), Civil Rights Division, U. S. Department of Justice. Hu's office has experienced a huge increase in calls for charges of discrimination related to the online verification system. She reported approximately 2,000 calls in Fiscal Year 2008 alone and currently up to 200 calls a month related to E-Verify misuse of the system. If Congress chooses to make E-Verify mandatory, she expects the calls regarding misuse to increase exponentially.

In conclusion, by emphasizing worksite enforcement, the Obama administration will push for E-Verify in the new year and hope to create support for comprehensive immigration reform that eventually leads to a path toward legalization for the nearly 12 million undocumented workers currently in the U.S.

In the meantime, ICE will not cool off. To avoid costly fines and criminal penalties, employers must ensure that they receive sufficient legal training related to E-Verify and other online verification systems as well as seek appropriate immigration and employment legal counsel to review I-9 compliance procedures and perform self-audits for all recordkeeping and hiring policies for an overall compliance program.

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