



Bulletproof Your Immigration Policy For The New Year

Insights

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Hospitality Industry Key Target In 2010

2009 brought a bold new audit initiative from the Department of Homeland Security (DHS) that will continue into 2010, with widespread investigations into companies' hiring records and I-9 policies.

In early July, Immigration and Customs Enforcement (ICE) issued 652 Notices of Inspection to businesses nationwide, including a number of businesses in the hospitality industry. DHS Assistant Secretary for ICE, John Morton stated that "ICE is committed to establishing a meaningful I-9 inspection program to promote compliance with the law." Morton referred to the auditing of 652 businesses I-9 forms as "only the first step in ICE's long-term strategy to address and deter illegal employment."

In 2008, ICE sent out only 503 similar notices, so 2009 will result in at least a 30% increase in audit notifications. These audits reflect a shift in the White House policy toward illegal immigration, focusing on employers instead of the illegal employees. ICE will continue to investigate employers in the hospitality industry using I-9 form audits to ensure that they are in compliance with all immigration laws.

Impact of an ICE investigation

ICE has taken a no-holds barred attitude in its worksite enforcement actions against employers which can involve police-style raids, the possibility of million-dollar fines, the threat of jail time for business owners, and the certainty of months of damaging press coverage for companies under investigation for employing undocumented workers.

In May 2009, three labor-leasing companies and eight individuals were charged in a 45-count indictment in relation to a criminal conspiracy to provide hundreds of unauthorized workers to hotels and other businesses across the country. The labor-leasing companies secured contracts with hotels and resorts promising to provide legal workers and to follow all labor and immigration laws. Among other things, the defendants are accused of using false information to obtain fraudulent H-2B work visas, fulfilling labor contracts using undocumented workers, and failing to properly pay the workers. The government is seeking a \$6 million forfeiture of money obtained as a result of their alleged offenses.

The indictment of labor leasing companies for the hotel industry is further evidence of the scrutiny that is being placed on the hospitality industry and why it's necessary to ensure your contractor's compliance, as well as your company's, with all immigration laws.

In 2010, ICE is expected to continue its quest to aggressively pursue employers who knowingly employ undocumented workers and who abuse the immigration system. Although any employer may be subject to an ICE investigation, ICE targets employers in what it calls our "nation's critical infrastructures," which has been defined to include the hospitality industry. Take steps now to reduce your risk of enforcement action if ICE investigates your company.

Steps To Take Now

Two enforcement initiatives were implemented this year: I-9 audits and H-1B site investigations. In 2010, we expect I-9 audits and H-1B site visits to be two of the main avenues used to ensure employers are in compliance with federal immigration laws.

Form I-9 Audits

Due to the increased focus on employers' I-9 practices, and the fact that the hospitality industry is one of ICE's targeted areas for worksite enforcement investigations, employers in the hospitality industry must prepare for an I-9 audit. A Notice of Inspection issued to a company requires surrender of I-9 forms within 3 business days, unless legal counsel can negotiate an extension in certain circumstances for large employers.

Here are 10 steps to protect your company and prepare for an ICE I-9 form inspection:

1. **Conduct an internal audit** of your I-9 forms and correct any errors or omissions on the forms. I-9 paperwork fines/violations can result from \$110 to \$1100 for each I-9 form.
2. **Have outside legal counsel audit** your I-9 forms and assess the company's level of compliance and exposure for potential fines.
3. **Re-verify any expiring work authorization.** Create a tickler system to remind you of employees expiring work authorizations. But remember that you are not permitted to re-verify an employee's permanent residence card (green card).
4. **Complete I-9 forms if any are lost or missing.** Use payroll records to ensure that you have I-9 forms for all required current employees or prior employees. A missing I-9 form can result in a \$1000 fine.
5. **Use the correct version of the I-9 form.** Currently, employers are permitted to use either the February 2, 2009 or August 7, 2009 version of the I-9 form.
6. **Purge forms** that you are not required to have. You may destroy I-9 forms three years from an employee's date of hire, or one year from the employee's date of termination, whichever is *longer*. If ICE audits your I-9 forms, you can be fined for errors on I-9 forms that could have been purged.

7. **Create an I-9 Audit Action Plan** that details the steps to take if your company is served with a Notice of Inspection.
8. **Conduct I-9 training** for employees responsible for completing I-9 forms based on the common mistakes found during the I-9 audit.
9. **Consider using an electronic I-9 program**, such as the Fisher Phillips *I-9 Solution*, to enter and store I-9 forms as a mechanism to increase your company's compliance with the I-9 process.
10. **Have a written immigration and I-9 policy** and distribute it companywide and emphasize to your HR and Key Employees their responsibility for legal compliance.

H-1B Site Audits

In 2010, H-1B employers in the hospitality industry should be prepared for unannounced site visits from U.S. Citizenship and Immigration Services (USCIS) to confirm the information submitted in H-1B filings.

The USCIS Office of Fraud Detection and National Security (FDNS) has commenced an audit of the H-1B program. As a part of the audit program, investigators are visiting H-1B employers to verify the accuracy of the information in the H-1B petition. Under the H-1B regulations, FDNS does not need a subpoena to investigate H-1B employers.

During these unannounced site visits, the investigators may request to speak with the company representative who signed the H-1B petition to confirm information contained in the H-1B petition, including the employee's job title, salary, work location, education background, employer's business, and revenue. They may also request to speak with the H-1B employees themselves, and the H-1B employees' supervisors. The investigator may also request to take photographs of the employer's facility.

You should review any H-1B petitions submitted for employees and ensure the accuracy of the information contained in the petition and confirm that the terms and conditions of the employee's employment have not changed. If you find substantial changes in the job title, duties, salary, work location or other inaccuracies in an H-1B petition, contact an immigration attorney to determine the best course of action to correct the inaccuracy.

The H-1B cap is expected to reach the yearly quota in early 2010, but has not yet been reached for this fiscal year. **As of October 30, 2009**, approximately **53,800** H-1B cap-subject petitions had been filed toward the H-1B cap of 65,000. Employers may continue to file new H-1B petitions until the quota is reached.

Please contact a member of our Global Immigration Group if you have questions about anything contained in this article.