Breaking The ICE: How Employers Can Push Back Against Punitive I-9 Fines

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Climate change may make our summers hotter, but the ICEman still cometh. Since late 2017, Immigration and Customs Enforcement (ICE) has significantly increased the number of Notices of Inspections issued to employers nationwide. This spike in I-9 audits has also resulted in an increase in assessed civil penalties and punitive fines to employers with non-compliant I-9s. While ICE audits and fines are on the rise, this article will walk you through options to assist with breaking the ICE and decreasing assessed fines.

What Employers Can Expect In 2019 Through The Election

If your business has not yet had an ICE I-9 Notice of Inspection, consider yourself lucky. However, if you think you are in the clear – think again. In the upcoming election year where politics will be dominated by immigration news, ICE will continue to punish employers for failures to complete I-9s properly and maintain a culture of immigration compliance. Driven by a "zero-tolerance" agenda, ICE will likely push for higher penalty amounts, and have less interest in coming to a reasonable settlement amount with most employers.

ICE assesses penalties after an employer receives a Notice of Inspection and ICE completes its I-9 audit; after that, an employer may receive a Notice of Intent to Fine (NIF). This document title speaks for itself – ICE intends to fine the company a dollar amount.

After receiving a NIF, you have two options: (1) request a hearing before the Office of Chief Administrative Hearing Officer (OCAHO); or (2) agree to pay the fine assessed by ICE. Below we will walk you through these two options and the financial impact each can have on your business.

How OCAHO Can Affect Penalty Amounts

OCAHO sits within the Executive Office of Immigration Review of the Department of Justice, where traditionally an Administrative Law Judge (ALJ) is assigned to adjudicate I-9 penalty hearings. The ALJ follows the same statutory regulations that ICE is required to follow, which includes the following five statutory factors to determine penalty amount: (1) the size of the employer's business, (2) the employer's good faith, (3) the seriousness of the violations, (4) whether or not the individual was an unauthorized alien, and (5) the employer's history of previous violations.

Although the OCAHO ALJ and ICE follow the same five factors in determining penalty amount, the ALJ is not bound by ICE fine amounts. Instead, the ALJ has discretionary authority in considering a

company's financial situation when determining the fine amount. This flexible discretion can impact fine amounts dramatically.

ICE "Fine Matrix" Calculating Penalty Amounts

ICE follows a "fine matrix" – entirely an ICE invention and a ridged matrix tying base fine amounts to the violation percentage. The violation percentage is broken into six levels, with the highest base fine amount when a company's violation percentage reaches 50 percent (meaning 50 percent or more of an employer's I-9s were found to be deficient).

Next, ICE utilizes its "enhancement matrix," which will either add or decrease to the base fine based upon its audit findings. The aggravating and mitigating factors are the five statutory factors discussed above: business size, good faith, seriousness, unauthorized aliens, and company history. Each of these five factors has a plus or minus five percent (+/- 5 %) to the base fine amount, making the maximum increase +25 % and the maximum decrease -25%

Unlike OCAHO, ICE does not consider the company's ability to pay or financial health when assessing fine amounts. Therefore, this ridged formula almost always leads to a hefty fine determination because it artificially inflates the base fine amount. ICE has traditionally demonstrated little interest in whether the fine proposal may have a devastating effect on the company. On the other hand, OCAHO ALJs regularly hold that the I-9 penalty should not be unduly punitive.

A Fine Calculation Example

Let's assume your company received a Notice of Inspection, then presented 100 I-9 forms to ICE for inspection. During the audit, ICE determined that 50 of the forms presented were defective due to sustentative and uncorrected technical violations (uncorrected errors on the form itself). This would result in your company having a 50 percent violation rate. Using ICE's fine matrix, it would calculate the fine using the highest base fine amount of $1,862 per defective I-9. Therefore, you would be facing a base fine already at $93,100 before factoring the aggravating and mitigation factors.

After ICE takes into account the aggravating and mitigating factors, the final fine amount will stand somewhere between $69,825 (base fine -25%) and $116,375 (base fine +25%).

This simple example demonstrates how ICE's unforgiving fine matrix artificially inflates the fine amount by setting the 50 percent violation rate as the threshold for the highest fine amount for each defective I-9 form. Even if your business has less than 100 employees, a small amount of defective I-9s can result in a hefty fine proposal.

OCAHO ALJ Fine Determination History

Unlike ICE, however, OCAHO case law indicates that the ALJ's fine determination has been far more lenient than ICE's fine matrix and enhancement matrix. In fact, in a review of the 32 OCAHO I-9 cases from the past four years, not a single OCAHO fine determination resulted in a fine increase. Of the 32 cases, only two cases upheld ICE's fine proposal without reduction. The other 30 cases all received a fine reduction, with the average fine reduction rate at over 40%. By way of example, in the simple

example above with your company being assessed a fine from ICE of $116,375, an average OCAHO reduction could reduce this fine to $69,231.

In the most recent 2019 OCAHO case, *U.S. v. Intelli Transport Services*, the ALJ primarily used the employer's small size to justify a nearly 80% fine reduction, which reduced the fine amount from ICE's $21,506 proposal to a mere $4,500. In another 2015 OCAHO case, the dollar amount fine reduction was over $207,000. These cases demonstrate that when ICE's fine proposal is high enough, there is truly little reason not to push back and litigate the case to the OCAHO.

Conclusion

While many attorneys have negotiated with ICE, few have experience with OCAHO and litigation strategies around reducing ICE proposed fines. If you have questions about ICE, OCAHO, and litigation strategies to "break the ICE," please contact any member of our firm's experienced Global Immigration Practice Group or your Fisher Phillips attorney.

For more information, contact the authors at RHua@fisherphillips.com (206.247.7014) or LSobaski@fisherphillips.com (816.460.1237).

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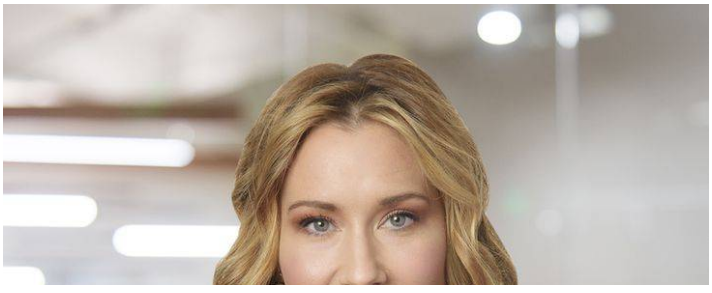

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