Immigration Compliance: Will Inflation Play a Bigger Role in I-9 Fines? 4 Takeaways for Employers

Insights
9.01.23

At a time when inflation is on everyone's mind, it appears that a federal immigration leader is paying attention and may let inflation play a slightly bigger role in I-9 fine assessments. The Chief Administrative Hearing Officer issued a curious precedent decision in June that poses a simple yet potentially pricey question about which date should be used to assess penalties. This date is important because it will determine which year's civil penalty amount will be applied to I-9 violations – and a later date could result in bigger fines. What do employers need to know about this development and what four key points should you keep in mind as you review your I-9 practices?

Background on I-9 Fines

Employers are no doubt familiar with the requirement to verify new hires' employment authorization using Form I-9 – and penalties for violations have increased through the years. When the I-9 law was enacted in 1986, it initially limited the civil penalty range for each defective I-9 to somewhere between $100 and $1,000. In the late 1990s, the fine range was adjusted to $110 to $1,100.

But since the passage of Bipartisan Budget Act of 2015, penalties assessed after August 1, 2016, have more than doubled. That's because they are now subject to the Civil Monetary Penalties Inflation Adjustments, which is often published by the DOJ annually. For example, the inflation adjusted I-9 fine range for penalty assessed after June 19, 2020, was between $234 and $2,332 for each I-9. And now the range for penalties assessed after January 30 this year has risen to $272 to $2,701 for each I-9.

When Immigration and Customs Enforcement (ICE) decides to seek monetary penalty against an employer for I-9 violations, it issues the employer a Notice of Intent to Fine (NIF). If the employer chooses to challenge it, the employer makes a request for a hearing. ICE will then submit the case to the Department of Justice's Office of Chief Administrative Hearing Officer (OCAHO). An administrative judge at OCAHO will adjudicate the case and make a final order on I-9 violations and fine assessment. Notably, the OCAHO proceeding can often take years to complete.

What Might Change?

For years, OCAHO has used the date when ICE issued the NIF to determine which year's inflation adjusted penalty amount it uses to calculate the fine. So far ICE has taken the same position. To an

adjusted penalty amount it uses to calculate the fine. So far ICE has taken the same position. To an employer facing a fine, using the NIF date to lock on the inflation schedule brings some predictability, because OCAHO proceedings can take years to finish. It also has the benefit of locking in a lower fine range before the final OCAHO decision comes years later.

In a recent decision vacating a penalty assessment, however, the Chief Administrative Hearing Officer pondered at length whether the date locking on the inflation adjustment chart should be the earlier and more favorable NIF date or the years-later date when OCAHO makes its penalty assessment. In this case – *United States v. Edgemont Group, LLC* – the Chief Administrative Hearing Officer ordered for further briefing on this question. While this is an unsettled question, the lengthy analysis in this decision shows he leans heavily toward using the later date to assess penalty amount, thereby letting inflation take a bigger bite.

What Does this Mean For Employers?

Here are four key points to keep in mind as you review your I-9 practices for compliance and respond to ICE actions:

1. Having a robust I-9 practice is always the best defense against potential fines, whether or not inflation will end up playing a bigger role.
2. I-9 compliance becomes even more complex now that the agency permits remote I-9 completion in certain conditions.
3. Employers should keep their I-9 compliance practice up-to-date and conduct self-audits to proactively spot compliance issues. While OCAHO may let inflation take a bigger bite in fine assessments, in many situations it's still worthwhile to challenge ICE's Notice of Intent to Fine at OCAHO. This is backed by decades of OCAHO case law showing regular drastic reductions in fines, as well as finding certain I-9s are not defective as ICE alleged.
4. ICE's game plan is simple: it will always shoot for the highest possible fine amount. OCAHO may remain a good place to see a potentially substantial fine reduction despite inflation adjustment.

Conclusion

Fisher Phillips will continue to monitor developments regarding I-9 compliance and will provide updates as warranted. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our Immigration Practice Group.

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