Employers Get Immigration Guidance from Government: Appeal I-9 Fines to Reduce Damage

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We rarely see a government body provide guidance to employers in such an extraordinary manner as we saw last month, when an immigration hearing officer sent a loud-and-clear message to employers facing I-9 fines: appeal your case if you want a fine reduction. The December decision from the Chief Administrative Hearing Officer was a welcome breath of fresh air and provided the clearest signal yet that employers should take active steps to address alleged I-9 violations. What do you need to know about this decision and what are the five reasons why you should follow the government's advice?

Quick Background on I-9s

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. Civil penalties for each defective I-9 were in the $100 to $1,000 range when Congress enacted the law requiring the forms in 1986, and didn't change much for 30 years.

But the fines more than doubled in 2016, and continued to rise each year since then – now the range for penalties has risen to $272 to $2,701 for each defective form. We expect those amounts to continue to steadily rise.

When Immigration and Customs Enforcement (ICE) decides to seek monetary penalties against an employer for I-9 violations, it issues a Notice of Intent to Fine (NIF). The employer can challenge the fine and request a hearing before 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, which can often take years to complete.

Date Dilemma Leads to Helpful Guidance

For years, OCAHO has used the date when ICE issued the NIF to determine which year's inflation-adjusted penalty amount should be used to calculate the fine. This had the benefit of locking in a lower fine range if the final decision came years later. But if a later date were used – such as the day when the OCAHO judge issues the final decision – it would almost always result in a higher inflation-adjusted base fine.

This past December, the Chief Administrative Hearing Officer put the issue to rest: he ruled that the date of fine assessment will be the date when OCAHO issues the final decision on I-9 sanction, thereby letting inflation play a bigger role in the fine assessment. That would seem to be bad news for employers.

But actually, the most striking point in this decision is not this interpretation of the term "date of fine assessment." Rather, the Chief Administrative Hearing Officer used this case to send an unequivocal signal to employers facing I-9 fines: fear not that inflation may bite you a little more – OCAHO remains the best option to see drastic fine reduction.

In his decision, the Chief Administrative Hearing Officer went as far as suggesting that it'd be "grossly irrational" for an employer to accept ICE's proposed fine without requesting a hearing at OCAHO:

> Although there is certainly no guarantee that OCAHO will reduce the penalty proposed by DHS, as long as DHS continues to propose penalties near the maximum end of the penalty range and as long as OCAHO continues to significantly reduce those penalties, it strains credulity to think that employers will be dissuaded from requesting a hearing before OCAHO.
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> Indeed, when confronted with a choice between a "guaranteed," unappealable penalty imposed by DHS and the opportunity to seek a lower penalty before OCAHO—with a statistically significant possibility that a lower penalty would be imposed—it would be grossly irrational for an employer to forgo its right to a hearing before OCAHO simply because the maximum potential penalty has increased since the time the NIF was served.

Why is ICE's Proposed I-9 Fine Almost Always Excessive?

Which begs the question: why are the fines almost always so excessive? That's because ICE relies on its "I-9 fine matrix" when calculating the amount. The matrix assigns different base fine amounts tied to the overall violation rate. Once the violation rate reaches 50%, however, the maximum base fine is assigned. This arbitrary formula drastically inflates the fine amount.

An employer with a total of two employees whose I-9s are defective would fetch the highest base fine, for example. But an employer with two violations out of 10 I-9s would fetch the low end of the base fine.

Additionally, while the law requires considering five factors to mitigate and aggravate fine amounts, ICE caps each factor at no more than 5% of the base fine. The math often disfavors employers. For example, an employer lacking in violation history or any unauthorized workers (two statutory factors taken into account) would see them reduce no more than 10% of the base fine under ICE's matrix.

Lastly, ICE's rigid matrix does not factor in the employer's ability to pay or the impact on the business. This helps explain why it's common to see six-digit fine proposals from ICE even for very small employers.

Why Should Employers Request an OCAHO Hearing?

Now that the OCAHO Chief Administrative Hearing Officer has taken the extraordinary step to call out those employers that don't request a hearing as "grossly irrational," it's proper to lay out the specific advantages of requesting a hearing at OCAHO:

1. OCAHO doesn't use ICE's fine matrix. This is one of the main reasons why it often drastically reduces the fine assessment.
2. OCAHO gives substantial weight to the employer's ability to pay and any negative impact on the business. After all, the I-9 sanction is not meant to bankrupt or severely damage a business.
3. Basic economic principles support requesting a hearing at OCAHO. Despite the government's modest inflation adjustment schedule, the principle of "one dollar today is worth more than one dollar tomorrow" still stands. OCAHO proceedings can often take at least one to two years to conclude. This delays when an employer must start to pay the fine.
4. Requesting a hearing with OCAHO does not affect settlement. Often, ICE is more inclined to offer a better settlement if you simply request a hearing.
5. A final judgment at OCAHO only deals with a monetary penalty. This differs from a settlement with ICE. In addition to the monetary penalty, an ICE settlement often also requires the employers to agree to a list of terms and sign up to certain monitoring programs.

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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