What Happens When ICE Visits Your Office?

The Immigration and Customs Enforcement ("ICE") branch of the United States Department of Homeland Security, is authorized by law to conduct workplace audits of an employer's I-9 compliance, and to conduct searches and seizures when there are grounds to believe that evidence of an unlawful immigration practice exists. Additionally, the Department of Labor ("DOL") has the authority to investigate compliance with I-9 procedures whenever it is on the property conducting wage and hour investigations of a business. You should be aware that during the fiscal year 2007, ICE made nearly 5,000 combined criminal and administrative worksite enforcement arrests, and secured fines and judgments in excess of $30 million nationwide.

The Federal Immigration Reform & Control Act of 1986 ("IRCA") is enforced by ICE and poses several obligations on employers. The obligations include that the employers must demonstrate their compliance with the law by following verification (I-9 Form) requirements, and treating all new employees in the same manner. The law also prohibits employers from employing or harboring unauthorized persons. An ICE enforcement action can be the result of governmental curiosity, or maybe a response to a governmental belief that the employer is failing to comply with these obligations.

As for I-9 Forms, the documentation that is acceptable varies based on the individual. Various lists of acceptable documentation can be obtained from ICE. These would need to be studied in order to ensure that, as an employer, you are in compliance with utilization of acceptable documentation.

A visit from ICE and/or the DOL can come without much notice to the employer. Consequently, it is highly advisable that the employer routinely review their compliance

with Federal immigration laws to ensure that they are, and remain, in compliance. In this article, we will attempt to identify some of the preventative steps that can be taken and should be considered before you receive an unexpected visit from ICE or the DOL. First, it is advisable that you review your existing employment practices to ensure that your staff is knowledgeable about, and fully complying with, your I-9 and other employment eligibility verification policies and procedures. Make sure that there is a process in place to require that all new-hires provide evidence of their current immigration status at the time of hire or immediately thereafter. Former employees who are rehired more than three years after the previous date of hire are required to complete a I-9 Form and provide supporting evidence. You should also have a process in place to re-verify all employees rehired within three years of the previous date of hire. The employer should retain each I-9 Form for three years after the date of hire, or one year after an employee terminates his or her employment, whichever is later. Also, make sure that you are using the revised I-9 Form that was issued on December 27, 2007, for all new-hires. Finally, there should be a process in place to ensure prompt follow-up on all "no-match" letters or other information suggesting that the I-9 information provided by the employee is not correct.

It is also advisable to periodically perform a spot-check on I-9 and other employment documents to make sure that responsible personnel are properly and consistently completing them. It is not uncommon for an employer to discover during these spot checks that they are missing I-9 Forms, or supporting documentation for some employees, and that other forms were not completely filled out.

When it appears that an I-9 Form has not been completed, it should be completed right away if the person is still an employee. Make sure that it is signed and dated on the

date it was actually completed, not the date the person began working, and the correct start date of employment should be noted on the I-9 Form. It is not advisable for the employer to back-date the signature line.

If an employer receives a "no-match" letter from the Social Security Administration, or a "Notice of Suspect Document" from the Department of Homeland Security, both cast doubt upon the employment eligibility of an employee. Employers should not ignore such letters. Recent regulations from the Department of Homeland Security provide that an employer may be knowingly employing an unauthorized employee if the employer has actual or constructive knowledge concerning the situation. Constructive knowledge is presumed under this rule when an employer: (1) Fails to complete or improperly completes the Employment Eligibility Verification, Form I-9; (2) acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its workforce, or to act upon its behalf; and (3) fails to take reasonable steps after receiving information indicating that the employee may be an alien whose employment is not authorized.

You should also designate a management representative who is authorized to meet and talk to ICE or DOL investigators when they visit the business. The designated representative should be educated about the procedures, including when the owner and/or legal counsel should be notified. Make sure that all the employees and supervisors of the company know that all inquiries from ICE or DOL must be referred only to the designated representative.

In the event ICE indicates a desire to conduct an audit to determine if the company is complying with the I-9 requirements, the law requires that a three-day advance notice be given to the employer.

If ICE is to conduct a search at the employer's place of business, the IRCA of 1986 requires that officers and employees of the Department of Homeland Security possess a search warrant to enter onto the non-public areas of the employer's property, or to question people who are there about their identity, their national origin, or their right to be or remain in the United States. A search warrant is also generally required before an employer is mandated to provide personnel records, documents, tenancy files, and any other information that can be sought in an ICE audit. Search warrants would not be required if: (1) Consent is given to enter the property by the property owner or its agent; (2) ICE is in hot pursuit of an illegal alien who has violated some other provision of the immigration laws; or (3) the property is within 25 miles of the United States border. The most common outcome of the investigations that ICE conducts is that the employer is given a list of individuals whose work authorization cannot be established. At this time, the employer is considered to have notice that it is employing illegal aliens. Once the employer confronts the individual employees with such information, and they are subsequently let go or fail to return to work, the employer's duty is not over. It is wise for employers to compare the names and employment document numbers provided by ICE on its list with the names and document numbers provided by future applicants for work. If they match, the employer should not rehire the individual until their work eligibility is resolved. If the person completing the I-9 Form does not compare the ICE list of unauthorized workers and their document numbers with the names and document

numbers of each new-hire, and the entity is subject to a follow-up audit and finds an individual on the list it had previously provided is still employed, or has since been reemployed, it is very likely the agency will charge the employer criminally with knowingly hiring an illegal alien.

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