

A LITTLER
PRESENTATION

Preparing for Increased Immigration Enforcement

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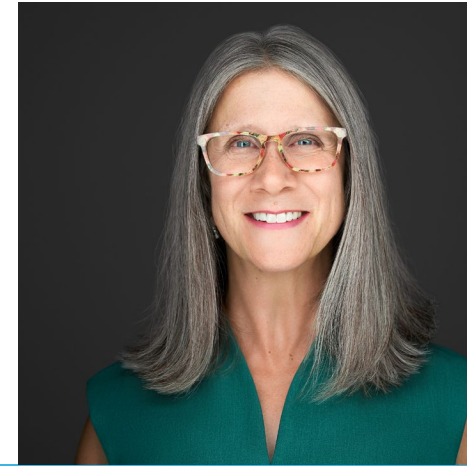
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I-9 Audits by ICE/HSI

- In first Trump administration, ICE enforcement of I-9 compliance was at all time high - 5981 in FY18, 6450 - FY19 ICE I-9 audits w/ goal of 15,000 in FY20 but COVID hit;
 - ICE raids of employers resumed in 2018, after 10 years of no ICE raids.
- By comparison, Biden Administration averaged 500 a year & audits under Bush and Obama were never had more than 3,000 a year;
- It is expected that Trump Administration will increase ICE I-9 audits to 15,000 a year with 100+ ICE worksite raids a year.

How to Prepare for ICE I-9 Audit

- Have immigration attorney conduct or oversee internal I-9 audit – cure errors on I-9 forms & ID undocumented workers;
- Ensure designated staff properly trained on preparation & maintenance of I-9s;
- Consider enrolling in E-Verify, which streamlines employment eligibility verification;
- Create immigration compliance policy, including designated employee to be POC in case ICE shows up on property;
- Maintain copies of documentation accepted as proof of identity & employment authorization with Form I-9.

What to do in ICE Audit

- When ICE arrives with Notice of Inspection (NOI), what to do?
 - Notify designated manager to communicate with ICE, if possible;
 - Get copy of NOI
 - Get business cards from ICE agents;
 - Never waive the 3-day period to produce I-9s;
 - Immediately contact your lawyer as time is of essence;
 - Only allow ICE into public areas of worksite;
 - ICE may only enter non-public areas of workplace with employer's consent or search warrant from federal judge.

ICE I-9 Audit (cont'd)

- What else is ICE demanding in ICE I-9 audit besides I-9 forms?
 - List of current employees;
 - Payroll and quarterly reports;
 - Information on ownership;
 - Names of staffing companies;
 - Articles of Incorporation and business licenses;
 - Whether a participant in E-Verify.

ICE Raid vs. ICE Audit

- ICE Raid - Large number of ICE agents converge on facility with criminal search warrant for employer's files and detain employees suspected of criminal offenses and/or civil offenses - undocumented status;
- ICE Audit – ICE agents deliver Notice of Inspection (NOI)/subpoena demanding I-9 forms of current & terminated employees & supporting documentation, if retained, including passport, green card, EAD, driver's license, & Social Security card, & E-Verify confirmations.

ICE Raids

- From 2008 through 2017, ICE did not raid employers;
- In April 2018, ICE raids returned & ICE has detained 100+ employees at each raid:
 - Bean Station, TN slaughterhouse;
 - Salem, Ohio meat supplier;
 - Sandusky and Castalia, Ohio plant nursery;
 - Texas manufacturers (2);
- Employees charged w/ ID theft & arrested or to Immigration Court.

Penalties for Violations

- Penalties have significantly increased for violations from November 2015 forward;
- **\$281-\$2,789** per I-9 form for 1st offense (depending on % of violations) for substantive or uncorrected technical violations; &
- **\$698-\$27,894** for knowingly employing unauthorized worker.
- Penalties increase yearly based on inflationary factor.

Criminal Penalties

- Can there be criminal penalties for immigration violations?
 - Yes, where ICE finds an employer knowingly employed individuals who lack work authorization or harbored undocumented workers, ICE may pursue criminal charges which could result in imprisonment of individuals involved for up to six months under the INA. Further financial penalties on individuals and employers may be imposed under federal law.

Internal I-9 Audits

- The best way to prepare for an ICE Notice of Inspection (NOI) is to perform an internal I-9 audit every 1 to 2 years, depending on size of company & number of employees hired year;
- By doing so, one can locate and correct substantive errors on I-9s;
- If you correct the errors properly, then there are few errors and more likely to receive lower or no penalties;

Internal I-9 Audits (cont'd)

- I realize companies want to balance cost of an I-9 self-audit vs. chances of being chosen for NOI;
- There's no way to know of chances of ICE NOI; however, you can look at few factors to help gauge chances – industry, any employees arrested by ICE;
- Additional points to remember:
 - NOIs are disruptive to your company;
 - Attorney's fees, for responding to NOIs, can easily run between \$7,500 to \$30,000, depending on number of employees; and
 - NOIs can cause sudden loss of employees.

Retention of I-9 Forms

- 1 year from termination or 3 years from original hire, whichever is longer;
- Must always retain current employees' I-9 forms;
- After retention period has expired, a company can and should purge I-9 forms.

Recommended Practices in I-9 Compliance

- Recommended practices for Immigration Compliance include the following:
 - Establish an internal compliance and training program covering I-9 compliance;
 - Ensure that only trained employees complete the Form I-9;
 - Establish a secondary review process to ensure that one person cannot subvert the process;
 - Establish a written Immigration Compliance employment eligibility verification policy;
 - Maintain copies of any documents accepted as proof of identity and employment authorization with the Form I-9 for all new hires;

Recommended Practices (cont'd)

- Conduct an annual internal Form I-9 audit.
- Consider participating in E-Verify to verify the employment eligibility of all new hires (however, there are some negatives);
- Establish a tip line for employees to report activity that relates to the employment of unauthorized workers and create a protocol for responding to credible employee tips; and
- Ensure that contractors and subcontractors establish procedures to comply with employment eligibility verification requirements.

Big Issues Right Now – TPS and CHNV

- The administration has canceled benefits for certain types of TPS and the humanitarian parole program
- There were several legal challenges to these cancellations
- The administration has recently been successful at the Supreme Court on ending lower court stays
- There are lots of questions for employers on how to handle TPS and CHNV

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Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

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Thank You



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