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## ICE Casts the Last Chill of the Fiscal Year: A New Round of National Audits

Immigration and Customs Enforcement (ICE) served hundreds of Notices of Inspections (NOI) to companies throughout the United States today, furthering the Obama administration’s focus on targeting employers (and their managers, executives, and recruiters) that employ unauthorized foreign nationals. It does not appear that ICE intends to issue a press release or discuss the specifics of this new round of administrative-related audits; however, this low profile appears to be in sync with their overall worksite strategy.

Assistant Secretary John Morton and his senior staff have previously assured the public that there are no definitive quotas set, but one cannot help but notice the end of the DHS fiscal year is a mere few weeks away. These new I-9 inspections will force the growing number of Forensic Auditors in the 26 Special Agent in Charge (SAC) districts to become more productive as their work load increases. Hopefully this will translate into closing out some of the older cases still pending. As set forth in the law, the NOIs provide three (3) days for an employer to submit their I-9s for inspection; depending on specific factors, extensions may or may not be granted. Whether these inspections were timed to increase the “numbers” or merely to ease the pro-enforcement rhetoric before the November elections is of no consequence to the companies that will be receiving them. Regardless of the impetus, it is guaranteed that ICE’s increased worksite activity is not going to end this November.

The need to commit to a comprehensive worksite compliance protocol cannot be overstated. During an IMAGE conference in August, fair warning was given to companies by ICE Representatives—the message: take action, review your I-9 related compliance, and institute a compliance plan now. With the economy improving and corporate transactions on the rise, also discussed was importance for immigration due diligence when considering mergers, acquisitions, and restructurings. ICE will not be forgiving to companies who turned a blind eye to a “problematic” work force or error-ridden I-9 forms. Sophisticated and experienced counsel can triage in a reactive situation, significantly reducing liability even in the few short days a company has to present their I-9s to the government.

Few will argue that worksite enforcement and scrutiny will continue until real, comprehensive immigration reform is a reality. Until that happens, diligent employers must tighten their compliance efforts, and those who have not yet instituted compliance initiatives must focus efforts on a comprehensive review of their records, policies and protocols. The fines for “knowing hire” violations alone range from \$1,100 to \$16,000 per unauthorized worker. ICE’s enforcement division reported fine assessments greater than \$4 million against 164 employers throughout the country, and noted that 147 employers have been criminally convicted or cited with worksite violations during the calendar year. Companies can no longer treat potential fines as just the cost of doing business. Employers cannot afford to ignore the tangible or intangible costs of noncompliance; the embarrassment and potential news coverage alone—highlighting a failure to implement policies and protocols—should be enough to consider this advice carefully.

Experience the GT team has gained by representing employers in some of the largest worksite investigations, as well as equally significant knowledge of our “mom and pop” operations that have had their livelihoods threatened, underscores the importance of having knowledgeable counsel at your side when dealing with ICE. Due to the young age of the Agency, combined with the lack of institutional knowledge that remains at ICE, it is often the case that trial attorneys, special agents, and auditors are using these audits and negotiations as a learning opportunity on handling large-scale investigations. If addressed quickly enough, erroneous violations or decisions can frequently be rationally discussed and alternative view points are often well-received by the agency when presented correctly.

The bottom line, however, is that taking precautions in advance of ICE knocking at your door is critical—conducting proactive audits, formulating and implementing best practices, combined with education and training by qualified attorneys, cannot be substituted. You should also consider adopting an identity verification solution and, when appropriate, an electronic I-9 solution to prevent future mistakes, automate reverification reminders, and centrally manage the I-9 process going forward. Remember: implementing an electronic I-9 program is something that requires careful consideration and careful review. Such measures may be invaluable tools for establishing a good-faith defense that your counsel can use during negotiations to lower or completely eliminate fines.

In the event that ICE visits your company or place of business, and you are served with a Notice of Inspection, we recommend that you take the following actions:

- 1) When the ICE agent serves the NOI (or administrative subpoena), sign for the document; do not panic.
- 2) Notify your management and executive team. Generally, it is critical that these investigations are handled centrally. Every minute counts as the law provides just three (3) business days for an employer to collect the Forms I-9 (and photocopies of supporting documents) and turn them over to ICE. Extensions may be granted in certain circumstances.
- 3) Contact competent immigration counsel immediately. If you do not already have the right relationship in place, inquire about experience in defending and litigating cases. Consider the capabilities and platform of the firm, including whether expertise in other areas such as litigation, white collar defense, government contract law, etc., is available. Inquire about the attorney’s personal track record with ICE audits. Request references, but do it quickly.
- 4) Identify a strategy to address your short-term and long-term response—including the prospect of significant litigation.
- 5) Prepare the organization for additional scrutiny. ICE has entered into multiple memoranda of understanding and agreements with other federal law enforcement agencies, including the Department of Labor’s Wage and Hour division, as well the U.S. Citizenship and Immigration Service, that may result in additional investigations.

ICE is continuing and increasing administrative investigations in an effort to remind employers that the culture of compliance is something to take very seriously. Companies located in the jurisdiction of larger ICE field offices, including Atlanta, New York, Washington D.C., Chicago, Dallas, Houston, Los Angeles, Phoenix and San Francisco, are among those favored in overall numbers of investigations, but no one is free from scrutiny. ICE officials are taking action in aggressively pursuing a worksite strategy focusing on a wide range of employers; now it is time for your company to take action.

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[Greenberg Traurig's Business Immigration and Compliance Group](#) has extensive experience in advising multinational corporations on how to minimize exposure and liability regarding a variety of employment-related issues, particularly I-9 employment eligibility verification matters. In addition to assisting in H-1B (Labor Condition Application) audits, GT develops immigration-related compliance strategies and programs and performs internal I-9 compliance inspections. GT has also successfully defended businesses involved in large-scale government worksite enforcement actions, I-9 Audits and Department of Labor Wage and Hour investigations. GT attorneys provide counsel on a variety of compliance-related issues, including penalties for failure to act in accordance with government regulations, IRCA anti-discrimination laws-Office of Special Counsel Investigations, and employers' responsibilities when faced traditional no-match situations as well as more serious workplace identity theft or other alleged misrepresentations made by employees.

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