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# Just When You Were Ready for Summer, ICE Sends a Chill Through the Nation

It was noticeably cooler in Washington this week as House Republicans sent a chill out to U.S. employers with Congressman Lamar Smith (R-TX) introducing an immigration enforcement measure that would make mandatory the currently voluntary E-Verify system, thus requiring immigration status checks for all new workers. But perhaps the biggest chill of the day comes from Immigration and Customs Enforcement's (ICE) newest worksite enforcement action, which has us expecting over 1,000 Notices of Inspection (NOI) to be served on companies throughout the U.S. starting today — June 15, 2011.

This most recent round of audits is not as random as the last, as this time companies have been selected for the most part through tips or leads, although to a certain extent, we can expect random reviews of critical infrastructure sites such as airports, chemical plants, and defense facilities. Given the more targeted nature of these audits, you may find that if you get a notice this time around, it may be because you have bigger liability somewhere within your workforce. Moreover, if you are a national company with locations in multiple states, you can reasonably assume that you could receive additional audit notices if anything is found to be amiss in your initial audit.

For those of you who are reading our Immigration Compliance blog and/or our GT Alerts for the first time, it is important to first understand what a NOI is and what receipt of one could mean for you and your business. For starters, the key to responding to any government audit is organization. Being in the throes of an ICE audit is not the time for implementing a new immigration compliance policy or for training your HR managers on better practices, however it is the time to assess liability and provide the government with a well-organized, thoroughly reviewed production of documents.

I have a NOI — What do I do?

The administrative inspection or audit process begins with the service of a NOI by an ICE agent (generally in person), which forces the production of a company's Form I-9s. The point of inspecting the company's I-9s and other records is to determine whether or not an employer is complying with the Immigration Reform and Control Act of 1986 (IRCA) and other immigration-related laws. Typically, ICE allows three (3) business days to produce the Form I-9s, not counting the date of service. Generally, you would need to turn over to the government the Form I-9s for all active employees and often for terminated employees for whom you still carry I-9 maintenance and retention responsibilities. If you are unsure about retention requirements, (assuming your company is not in receipt of a NOI), now would be a good time to brush up on your I-9 training.

Upon receipt of your NOI, start by making copies and taking an inventory of any documents to be turned over to the government. The NOI will generally include an additional request for supporting documentation, which is often limited to a copy of the payroll, list of current employees, Articles of Incorporation, and business licenses, although some Special Agent In Charge offices may even request Social Security no-match letters, manager information, and copies of compliance polices. It is worth noting that if you feel the laundry list is too cumbersome, you may try placing a call to the agency to reduce or delay the submission. It would also be worth your time to consider hiring an attorney. Sophisticated and experienced immigration counsel can triage in a reactive situation, thus significantly reducing liability even in the few short days a company has to present their I-9s to the government.

Once in ICE's possession, a Forensic Auditor for compliance inspects the Form I-9s. When technical or procedural violations are found[1], an employer is given ten (10) business days to make corrections, however, companies are not provided with an opportunity to correct substantive violations. Substantive violations include missing document numbers and signatures and are generally considered more serious.

Employers are often surprised to learn, however, that substantive violations may be reduced to mere technical violations if copies of the identity/work authorization documents were maintained and the violations surround information located on one of the those documents, thus translating into reduced exposure given that the employer is generally fined for all substantive and uncorrected technical violations.[2]

However, if you are one of those unlucky employers that is determined to have knowingly hired or continued to employ unauthorized workers, you can expect to be fined[3], and, in certain situations, criminally prosecuted should the U.S. Attorney's office be interested in your case. Additionally, employers found to have knowingly hired or continued to employ unauthorized workers may be subject to debarment by ICE. This means that the employer would be prevented from participating in future federal contracts and from receiving other government benefits. And finally, it goes without saying that a loss of reputation and of workers can devastate a business.

Immigration Compliance Remains a Hot Topic


This newest round of audits confirms that ICE continues to consider these inspections an important tool in the government's enforcement toolbox. Our previous GT Alert provides further details on how to respond and what to do if your company receives a NOI.

At this time, the Obama administration has resurrected the use of civil fines for paperwork and substantive violations, making shoddy Form I-9 completions a very expensive problem. ICE has beefed up its educational efforts in recent months and is revamping its employer compliance assistance program, the ICE Mutual Agreement between Government and Employers (IMAGE). In fact, the agency is holding meetings in several cities over the next few months to unveil changes to its program. Such changes are expected to include a percentage reduction in the fine amounts for those companies joining its best practices program. Watch our GT Immigration Compliance blog for more information on this in the coming weeks. It also bears noting that immigration compliance is now on the radar screens of previously unlikely parties, such as the board members of public companies, private equity funds and other investors who are beginning to understand the liability and implications associated with non-compliance. Moreover, E-Verify is a hot topic on the Hill, as a legislative overhaul is in play and states continue to introduce harsher immigration laws with constantly changing

requirements. Such conditions make it almost impossible for national companies to keep up with compliance requirements in a timely manner.

The Bottom Line

The bottom line is this: Take these inspections seriously and know that while some companies luck out with inexperienced auditors and agents who do not pursue an investigation to the extent that they should, other agents are relentless and savvy. Generally, neither ICE nor the U.S. Attorney will forgive companies who turned a blind eye to a "problematic" work force or error-ridden I-9 forms that lead to the knowing hiring of illegal workers.

The message from ICE remains the same: Be proactive; review your I-9 related compliance; conduct internal audits and act on the results; do not ignore Social Security no-match notifications and potential identity theft issues; provide ongoing training to those individuals completing Form I-9s; and finally, above all else, institute a compliance plan now!

[1] Pursuant to INA §274A(b)(6)(B) (8 U.S.C. § 1324a(b)(6)(B)) generally defined as paperwork violations that would not contribute to the hiring of an authorized worker.

[2] Penalties for substantive violations, which includes failing to produce a Form I-9, range from $110 to $1,100 per violation. In determining penalty amounts, ICE considers five factors: the size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations. (See INA §274A(e)(5) (8 U.S.C. 1324a (e)(5)))

[3] Monetary penalties for knowingly hiring and continuing to employ violations range from $375 to $16,000 per violation, with repeat offenders receiving penalties at the higher end.

This *Business Immigration and Compliance Alert* was written by Dawn Lurie. Questions regarding the subject matter of this information should be directed to Ms. Lurie at 703.903.7527 (luried@gtlaw.com) or to any Greenberg Traurig Business Immigration and Compliance team member.

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.

For more insight into immigration compliance and enforcement issues, please visit GT's Immigration Compliance blog at: www.immigrationcomplianceblog.com/.

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