

Worksite Enforcement Investigations on the Rise

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Nearly Double as Compared to Previous Year

Acting Executive Associate Director for Homeland Security Investigations (“HSI”) Derek N. Benner stated in a May 14, 2018 press release that “Employers need to understand that the integrity of their employment records is just as important to the federal government as the integrity of their tax files and banking records. All industries, regardless of size, location and type are expected to comply with the law.”

U.S. Immigration and Customs Enforcement (“ICE”) announced that it would increase worksite audits by 400% in 2018. Congress also appropriated additional funds to hire at least 10,000 new worksite enforcement officers. Enforcement investigations nearly doubled as compared to the entire previous fiscal year. The recent press release by ICE provides statistics for the first seven months of the 2018 fiscal year (October 1, 2017 to May 4, 2018). HSI, the unit in charge of I-9 audits and investigation, initiated 2,282 I-9 audits and opened 3,510 worksite investigations, resulting in 594 criminal and 610 administrative worksite-related arrests. By comparison, for the 2017 fiscal year (October 1, 2016 to September 30, 2017), HSI conducted 1,360 I-9 audits and 1,716 worksite investigations, which resulted in 139 criminal arrests and 172 administrative arrests related to worksite enforcement.

Companies need to be prepared to respond to the increased focus on worksite audits, investigations and the enforcement measures that may follow. Failure to follow the law can result in criminal and civil penalties. Even simple mistakes, like paperwork violations, can cost companies between \$216 and \$2,126 per each employee’s Form I-9. 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. The most recent increased penalties are available [here](#).

Steps can be taken to avoid missteps and ensure compliance, including:

- Understanding the I-9 audit process and timing
- Understanding HSI’s approach with respect worksite enforcement
- Knowing what is at stake for noncompliance
- Measures to mitigate risk of noncompliance

Understanding the I-9 Audit Process

Under federal law, employers are required to verify the identity and employment eligibility of all individuals they hire, and to document that information using the Employment Eligibility Verification Form I-9. ICE uses the I-9 inspection program to promote compliance with the law, part of a comprehensive strategy to address and deter illegal employment. Most I-9 audits progress in the following way:

- ICE/HSI serves an employer with a Notice of Inspection, alerting them of a pending audit of their hiring records to determine whether or not they are in compliance with the law.
- Employers are required to produce their company’s Form I-9s and supporting documents, including payroll records, list of employees, articles of incorporation, etc. By law, employers are provided with at least three business days to produce the requested documents.
- The HSI audit team will review each form for technical or procedural violations, and provide the employer with 10 business days to make corrections.

If employers are not in compliance with the law, an I-9 inspection of their business will likely result in civil fines and could lay the groundwork for criminal prosecution if they are knowingly violating the law. All workers encountered during these investigations who are unauthorized to remain in the U.S. are subject to administrative arrest and removal from the country. Here is an outline of the process.

Three-Pronged Approach to HSI Enforcement

HSI uses a three-pronged approach with respect worksite enforcement.

1. HSI examines compliance through the I-9 inspection process, which can trigger issuance of a notice regarding potential civil fines and referrals for debarment if applicable.
2. Possible arrest of employers in extreme cases and the administrative arrest of unauthorized workers.
3. If applicable, HSI conducts outreach efforts with the company through the ICE Mutual Agreement between Government and Employers, or IMAGE program, to instill a culture of compliance and accountability.

Steps to Take Now to Stay Compliant

Because employers now have a heightened risk of being audited or investigated by ICE/HSI, it is increasingly important to make sure your organization's I-9 forms are completed correctly. As previously reported, an employer should make sure to identify an individual or team within the organization that is responsible for I-9 compliance. The team should review the company's current protocols and procedures in connection with I-9 preparation process as well as processes for record keeping and purging of those I-9s that are outside the compliance period. The I-9 compliance program should also have an outline of a plan to follow in the event of an I-9 Audit by ICE.

We also recommend that employers conduct periodic internal I-9 audits to ensure that each employee has a Form I-9, and that it was prepared accurately and on the correct version of Form I-9. The Department of Justice and ICE have provided joint guidance on conducting internal audits. This provides many companies an opportunity to shore up their immigration compliance efforts or else face substantial penalties.

An employer should make sure that it is using the most current version of the Form I-9, as it is revised frequently. U.S. Citizenship and Immigration Services last issued a new version of the I-9 Form which went into effect on September 18, 2017.

Finally, employers should consider providing refresher training to human resources professionals and other managers responsible for completing Section 2 of the I-9 and Review I-9 processes and policies to ensure they are up to date with the recent changes in I-9 best practices. We can certainly assist with this.

What Is the Cost of Noncompliance?

In fiscal year 2017, U.S. employers paid \$97.6 million in judicial forfeitures, fines and restitution, and \$7.8 million in civil fines. Last year, ICE assisted the Department of Justice during a lengthy audit and investigation spanning 6 years that resulted in a tree trimming company to enter a guilty plea with largest civil settlement agreement ever levied by ICE. The \$95 million dollar recovery, including \$80 million dollars criminal forfeiture money judgment and \$15 million dollars in civil payment, represents the largest payment ever levied in an immigration audit case.

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