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United States: I.C.E. Storm In The Forecast – I-9 Compliance And Employer Liability

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There are times when the simplest of tasks can create the biggest of problems for employers. We have been seeing such a phenomenon occur over the past three to four years in the area of I-9 compliance. I-9 audits, or raids, no longer encompass searches for illegal workers with the goal of deportation. Now, they heavily focus upon the Form I-9 itself, as well as the employer's role in employing or retaining illegal workers. Both state and federal governments view employers as the "root cause of illegal immigration." Fialkowski, Elise A., "Pa. Mandates E-Verify for State Public Works Contractors," Vol. P. 2497, The Legal Intelligencer, September 6, 2012 at 5.

Auditors evaluate these forms, seeking strict compliance. Indeed, on the federal side, the U.S. Immigration and Customs Enforcement agency guidance to its field auditors emphasizes using the I-9 audit process, inter alia, to "advance criminal cases." As strict compliance is not often the reality, the government has issued a record number of civil and criminal penalties against employers who fail to properly complete, maintain and, where necessary, update I-9 forms. Employers also face liability for employment of illegal workers. Plainly, our current administration has shifted the focus of immigration in the employment sector completely. Instead of seeking to remove illegal workers from our U.S. companies, the federal government is focused upon punishing employers for their failure to comply with U.S. immigration laws. Punishment often comes in the way of heavy fines. The criminal statue also threatens imprisonment.

On the state side, a number of states, including Pennsylvania, have passed E-Verify legislation. Under the Pennsylvania statue, to become effective on January 1, 2013, all public works contracts with a value in excess of $25,000 are obligated to use the E-Verify system, and a statement of compliance will be a pre-condition for the award of a public contract.

Form I-9 Compliance from a Civil Perspective

The fines for the seemingly simple I-9 violations can be extremely large. For example, Abercrombie & Fitch, which did not at the time have a single unauthorized worker, was recently fined $1million for what were essentially paperwork errors. Since 2009, more than 6,000 I-9 audits have been conducted and fines of more than $76 million have been levied against non-compliant employers. Basically, employers are being "nickel and dimed" with I-9 technical violations. "I-9 Audits on the Rise in Obama Administration," January 11, 2011, Society for Human Resources Management; Common I-9 Blunders and How to Fix Them, Castagnera on Higher Ed, HR and Risk Management, March 15, 2011. Given the present focus on I-9 compliance, employers must ensure that their I-9 practices comply with the law. In order to do so, employers need to understand the I-9 itself and the attendant regulations.

All U.S. employers are required by law to verify the employment authorization of all workers hired on or after November 6, 1986, for employment in the United States, regardless of the workers' immigration status. Employers who hire or continue to employ individuals knowing they are not authorized to be employed in the United States, or who fail to comply with employment authorization verification requirements, may face civil and, in some cases, criminal penalties.

In order to demonstrate the employer's compliance with the law and the employee's work authorization, the Form I-9, Employment Eligibility Verification, must be completed for each newly hired employee, including U.S. citizens, permanent residents and temporary foreign workers. Through this verification process, employers ensure that employees possess proper authorization to work in the United States and that the employer's hiring practices do not unlawfully discriminate based on immigration status.

The Form I-9 is a seemingly simple document, but minor mistakes made in completing, updating and destroying these forms can cause severe and unintended consequences. Domestic employers now are now being audited and sanctioned for simple administrative errors. What kind of mistakes by employers can lead to the imposition of sanctions? A few examples include: failing to keep an I-9 for the required amount of time; failing to destroy a form in a timely manner; failing to complete necessary portions of the forms; failing to obtain employee signature or attestation date; failing to record acceptable documents relied upon by the employer in hiring the employee; failing to include dates of rehire; failing to re-verify

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the employee's employment eligibility; and, failing to comply with the appropriate deadlines for form completion.

Civil fines for I-9 compliance violations can be extremely costly. Failing to comply with Form I-9 requirements imposes a minimum $110 for each form and a maximum $1,100 for each form for all offenses. Other offenses attach even more severe civil fines, such as committing or participating in document fraud, which has a fine range of $375 to $1,100 for each worker for a first offense and $3,200 to $6,500 for each worker for a third offense. Civil fines for hiring or continuing to employ unauthorized workers range from $375 to $3,200 for each worker for a first offense and $4,300 to $16,000 for each worker for a third offense. See Section 274 A of the Immigration and Nationality Act (INA) as well as the Immigration Act of 1990 and the Illegal Immigrant Responsibility Act (IIRIRA) of 1996.

Criminal Immigration Offenses

In addition to I-9 violations, employment of illegal workers continues to be an area of governmental interest and concern. In the fiscal year ending September 30, 2010, Immigration and Customs Enforcement had audited more than 2,740 companies, nearly twice the number of the preceding year, and had levied more than $7 million in fines against companies found to employ illegal workers. Mirian Jordan, "Crackdown on Illegal Workers Grows," Wall Street Journal, January 20, 2011.

The primary federal criminal immigration statute concerned with the employment or sheltering of illegal immigrants is Title 8 U.S.C. § 1324(a). Although § 1324(a) casts a wide net of potential criminal conduct, the primary area of concern for most employers will be in connection with hiring those later discovered to have entered the United States illegally. It is here that the employer's obligation to comply with the requirements of the I-9 intersects with the specter of criminal prosecution. Thus, not only is it unlawful for an employer to knowingly hire an unauthorized alien, but it is also unlawful for an employer who has hired an alien to continue to employ that person with the knowledge that the employment is unauthorized. The significance of these prohibitions is that an employer who relies upon documents provided by the alien, but chooses not to utilize the E-Verify program (voluntary for most businesses) to ensure that the information provided by the alien on the I-9 is true and correct, might be found to have acted in reckless disregard of its obligation to employ only those aliens authorized to work in the United States. However, if the employer opts not to use E-Verify, but internally monitors its compliance with the law and uses an outside service to audit the accuracy of its I-9 forms, then any contention by the government that the employer knowingly violated the law can be met head-on. Indeed, where the employer relies upon outside counsel to conduct these compliance audits, it would suggest that, not only did the employer not act in knowing violation of the law, but also the employer acted upon the advice of counsel.

The penalties for violating the statute are substantial and could include arrest or debarment from participation in federally funded programs. The unit of prosecution under §1324(a) is based upon each alien with respect to whom a violation occurs. Prior to 1996, when the Illegal Immigration Reform and Immigrant Responsibility Act was enacted, the unit of prosecution was for each transaction, regardless of the number of aliens involved. If an employer is found to have engaged in a "pattern and practice" of violating the statute, then the employer shall be fined not more than $3,000 for each unauthorized alien employed and imprisoned not more than six months for the entire transaction. The legislative history of the statue provides that the term "pattern and practice" is to be given a commonsense, rather than overly technical meaning and must evidence regular, repeated and intentional activities. But, it does not include isolated, sporadic or accidental acts. Thus, where the employer's business is large, and in an industry, such as agriculture, that routinely uses seasonal labor, it would not appear to be difficult for the government to establish the requisite "pattern and practice."

Conclusion

The landscape for employers has dramatically changed in the last several years. Unlike the prior administration, which seemed to focus on high-profile raids that resulted in the detention and deportation of thousands of illegal aliens, the government now seeks to audit employers and collect monetary penalties for simple and unintended paperwork violations. In the more egregious cases, the audits may uncover a "pattern and practice" by an employer that rises to the level of criminal conduct. The employer must do all in its power to ensure that it will be in compliance with the law.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Specific Questions relating to this article should be addressed directly to the author.