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Immigration Compliance Updates – Turning the Page

On November 19, 2009, leaders of the U.S. Department of Homeland Security (DHS) immigration agencies announced several policy initiatives to include 1,000 new audits of employers' I-9 forms and business records. In contrast to prior enforcement efforts, the DHS has turned the page on high-profile worksite raids and sporadic criminal prosecutions. The DHS is continuing its efforts in the area of administrative investigations and fines, which represents a more systematic, far-reaching approach to promote compliance throughout the U.S. in a wide variety of industries. This modified approach recently resulted in one company's termination of 1,800 employees, roughly 25 percent of its workforce, and another company's termination of 1,200 employees.

The following is a summary of these initiatives and recommended actions to deal with the requirements in this area of the law.

Expansion of Administrative I-9 Audits

On November 19, 2009, John Morton, Assistant Secretary of the U.S. Immigration and Customs Enforcement (ICE), announced that 1,000 new Notices of Inspection had been sent to employers across the U.S. This second round of administrative investigations follows 654 I-9 audits initiated in July of 2009.

ICE's current enforcement priorities include:

Employers operating in areas of critical infrastructure and national security, such as airports, refineries and military bases;

Employers subject to prior immigration complaints or investigations; or

Employers subject to allegations or investigations of labor law violations in the workplace.

Employers covered by these enforcement priorities should be ready for an I-9 audit and should do a thorough assessment of compliance practices and related records.

If an employer receives a Notice of Inspection, it may be required to turn over much more than its required I-9 forms on short notice. Current Notices of Inspection are also requesting the following documents be produced within three business days:

Detailed monthly payroll information and documentation;

Rosters of Independent Contractors, with dates of utilization, and 1099 forms;

Rosters of on-call employees;

Social Security Number “No-Match” notices;

All recently filed immigration sponsorship petitions, such as H-1B visa petitions and Labor Certification Applications; and

Information regarding use of temporary staffing companies.

If an employer receives a Notice of Inspection, its representatives should contact knowledgeable legal counsel to adequately prepare for the inspection, assessments, mitigation efforts, negotiation, and in some cases, administrative proceedings.

Initial Results of July 2009 I-9 Audits

ICE also presented a summary of its enforcement efforts initiated in July of 2009, which included 654 I-9 audits. Three items of particular interest include:

1. ICE identified that 16 percent of the approximately 85,000 I-9 records reviewed were completed for workers who, upon closer review by ICE, probably lack authorization to work in the U.S. These workers likely presented counterfeit documents that reasonably appeared to be valid at the time of hire.
2. About one-half of the audits have either resulted in fines or may result in administrative fines. A total of 61 cases have been assessed fines totaling \$2.3 million and 267 cases may also be assessed fines. Some of these audits may also lead to criminal prosecutions.
3. Forty-five businesses and 47 individuals have been debarred from doing business with the federal government.

4. About one-half of the audits resulted in Warning Notices without penalties. These Notices were issued to employers who were either found to be in compliance, or made a commitment towards future compliance.

While the results of the first round of audits are mixed, it is expected that the second round of 1,000 I-9 audits will yield more consistent results and, on average, more significant fines. From the government's perspective, employers should be on notice and should make efforts to improve compliance efforts. A prudent employer should work with counsel to assess current compliance and make efforts to improve, especially if subject to one or more of the enforcement priorities listed above.

DHS's Optional Programs - E-Verify & IMAGE

DHS is again actively promoting two optional I-9 related items, E-Verify and IMAGE, to employers.

E-Verify is generally an optional means for employers to perform a secondary verification of a new employee's work authorization and Social Security Number information. After completing a new hire's I-9 form, E-Verify employers must submit a query over the Internet to verify the employee's Social Security Administration account and immigration service data. Employers must verify all newly hired employees in covered work locations and must make verification inquiries within three days of the hiring. If the initial query does not clear the system, the employer must then work closely with the employee to attempt to resolve the problem. If unable to resolve the nonconfirmation, the employer must end the employment relationship. E-Verify employers waive Fourth Amendment rights and their data may be subjected to various types of searches without notice.

Less than 2 percent of U.S. employers currently use E-Verify, but participation has grown because certain federal contractors have been required to utilize the system. The DHS is actively promoting expanded E-Verify use because it believes this will reduce opportunities for unauthorized workers to gain employment in the U.S. However, some authorities have predicted that unauthorized workers will increasingly utilize good fake documents with information of authorized workers to clear the system, thereby defeating the government's goals. As a result, it is important for E-Verify employers to develop a competent network of users and continuously monitor activities in its account.

Husch Blackwell Sanders' immigration attorneys regularly counsel employers on the E-Verify account and user network set-up, verification protocols, and self-assessment of past E-Verify use. Regular, systematic oversight of E-Verify use will minimize the risk that DHS will detect problems as it conducts covert searches of all E-Verify data.

IMAGE (ICE Mutual Agreement Between Government and Employers) has been actively marketed over the past three years and continues to be promoted, in spite of very low interest in the program. The government has pitched this program to thousands of employers with annual program budgets of up to \$5 million, yet only 50 employers in the U.S. have signed up for the program. The program

represents a one-sided bargain that primarily serves as an investigative and enforcement tool. Although some of the program's requirements can be effective compliance practices, IMAGE requires employers to waive critical rights and abandon the ability to investigate and manage issues internally. Unless significantly revised, IMAGE is an offer that many employers will continue to refuse.

What This Means to You

In the current enforcement environment, employers should make it a priority to review immigration compliance practices and records, to include conducting self-audits. Taking these actions can help an employer potentially avoid costly administrative fines for paperwork and more substantive violations, unplanned loss of a significant number of employees, and potential debarment from doing business with the federal government.

Contact Info

Should you have any questions, please contact your Husch Blackwell Sanders attorney.

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