

p.s.

Poyner Spruill^{LLP}
ATTORNEYS AT LAW

ICE Targets Large Employers: How to Be Prepared

02.28.2011

Jennifer G. Parser

David L. Woodard

On January 20, 2011, John Morton, Chief of US Immigration and Customs Enforcement (ICE), announced the creation of an Employment Compliance Inspection Center (ECIC), and the news should put all large employers on notice. The ECIC will be staffed to examine exclusively the hundreds or even thousands of I-9s of larger companies targeted for an ICE audit.

ICE has reported that last fiscal year it conducted 2,740 audits and recorded \$7 million in fines, considerably more than the \$1.0 million levied in 2009 and the \$700,000 levied in 2008. For the most part, smaller employers were targeted. The new ECIC has been created to support regional immigration offices that may have avoided auditing large employers because of the logistics of conducting an audit. "We wouldn't be limited by the size of a company," Morton said. Termed silent raids, an ICE audit with the enhanced ability to handle a large volume of I-9s implements a promise in 2009 by the Obama administration to move away from the Bush administration's practice of conducting surprise raids that resulted in massive worker arrests and eventual deportations. The ICE focus is now on finding the employers who employ undocumented workers instead of targeting the undocumented workers themselves.

p.s.

POYNER SPRUILL publishes this newsletter to provide general information about significant legal developments. Because the facts in each situation may vary, the legal precedents noted herein may not be applicable to individual circumstances. © Poyner Spruill LLP 2010. All Rights Reserved.

RALEIGH

CHARLOTTE

ROCKY MOUNT

SOUTHERN PINES

WWW.POYNERSPRUILL.COM

301 Fayetteville St., Suite 1900, Raleigh, NC 27601/P.O. Box 1801, Raleigh, NC 27602-1801 **P: 919.783.6400 F: 919.783.1075**

Corrections to I-9s

Late last year, ICE has also provided some insight into how it will treat deficient I-9s. So-called “good faith” violations are viewed dimly if corrections are made after ICE sends a “Notice of Inspection” - the first step in an audit. ICE indicated that only technical violations should be corrected after a Notice of Inspection. Armed with this knowledge, employers need to pro-actively perform internal audits on a regular basis and make corrections before receiving a Notice of Inspection.

Document all I-9 Corrections Carefully

ICE will examine if the employers’ actions in correcting any defective I-9 are reasonable by examining what happened, when it happened and why it happened through a contemporaneous record. Therefore, corrections should be conspicuously written in a different color ink with date and name of person correcting, as well as an explanatory note for the correction, either in the margin or if using an electronic I-9 system, through recorded notations. An electronic I-9 provider must have adequate safeguards to ensure that the I-9 is complete and updated if needed. The \$1 million plus Abercrombie & Fitch settlement for I-9 violations, albeit all made in good faith, was the result of Abercrombie & Fitch designing its own electronic I-9 system that turned out to be defective rather than choosing a well-designed system by an outside provider.

Section 1 Must be Corrected by the Employee

ICE has also indicated it is uncomfortable with an employer making changes to Section 1 of the I-9 as the potential for fraud exists. It is prudent to allow the employee to make any corrections to Section 1 of the I-9.

ICE Auditors' Instructions

If an employer is audited by ICE, get any follow-up instructions from the auditor in writing, as ICE has confirmed that its auditors do not operate in a standardized fashion. With the creation of the ECIC, it is to be hoped that review of larger employers' I-9s will receive the same standard of review, but for the time being, it is best to carefully document in writing any instructions received from an auditor as proof that his or her instructions were only being followed in the event of any ICE follow-up or subsequent audit.

