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IMMIGRATION ALERT

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ICE Undertakes 1,000 New Form I-9 Audits

On November 19, 2009, the Department of Homeland Security's Immigration and Customs Enforcement agency ("ICE") Assistant Secretary John Morton announced that his agency issued Notices of Inspection (NOIs) to 1,000 employers across the country associated with critical infrastructure. These audit notices notify business owners that ICE will perform a comprehensive review of (i.e. audit) their hiring records (specifically Form I-9s and associated documents) to determine compliance with employment eligibility verification laws. These 1,000 notices appear to be in addition to the 652 audits ICE announced on July 1, 2009. (For more information see our earlier Alert on this topic.)

According to Assistant Secretary Morton, "ICE is focused on finding and penalizing employers who believe they can unfairly get ahead by cultivating illegal workplaces.… We are increasing criminal and civil enforcement of immigration-related employment laws and imposing smart, tough employer sanctions to even the playing field for employers who play by the rules."

As it previously reported, ICE confirmed that the 1,000 businesses served with audit notices this week were selected for inspection as a result of a combination of the nature of their business (linked to public safety and/or national security) and investigative leads and intelligence. The names and locations of the businesses remain confidential.

All employers in the United States are required to have a Form I-9 on file for all employees to verify their identity and authorization to work in the United States. The form requires that employers execute this process upon hire of an employee, review and record the individual's original, valid identity documents and determine whether those documents reasonably appear to be genuine and related to the individual. The Rules governing the Form I-9 process changed on April 3, 2009. (For more information see our earlier Alert on this topic.)

ICE reports the following statistics resulting from the 654 audits announced in July:

As of November 19, ICE agents reviewed more than 85,000 Form I-9s and identified more than 14,000 suspect documents — approximately 16 percent of the total number reviewed.

- 61 Notices of Intent to Fine (NIFs) have been issued, totaling $2,310,255 in fines. An additional 267 cases are being reviewed for the issuance of NIFs.
- 326 cases were closed after businesses were found to be in compliance or after being served with a warning notice in expectation of future compliance.

ICE Issues Guidance on its Form I-9 Audit Process

Concurrent with its announcement regarding Form I-9 audits, ICE released formal guidance on its process for Form I-9 inspections and civil fine structure. The guidance outlines ICE's process for a Form I-9 inspection, the penalties for various related violations, and the factors ICE considers during the course of the inspection and in order to determine a fine, including mitigating or enhancing factors involved.

Under the Immigration Reform and Control Act ("IRCA") of November 6, 1986, the rule which requires employers to verify the identity and employment eligibility of their employees, employers are required to maintain *original* Form I-9s for inspection (for all current employees and for former employees, hired within the last three years or terminated in the last one year, whichever is longer). ICE initiates the administrative inspection process with the service of a Notice of Inspection (NOI) upon an employer compelling the production of Form I-9s, typically within three business days. ICE will often also request the employer to provide additional supporting documentation, such as payroll records, lists of employees, Articles of Incorporation, business licenses, etc.

ICE generally elects to conduct its inspection of the Form I-9s (with the supporting documents) for compliance at the employer's location. In some instances, the employer may be required to send/deliver their documents to ICE's offices. Under either scenario, ICE will retain the right to retain copies of any of the documents presented for inspection.

If technical or procedural violations are found (i.e. typographical errors on forms), ICE will generally allow the employer ten business days to correct them. If substantive violations are found (i.e. missing forms or improperly verifying identity or work authorization), ICE will fine the employer for those violations (along with any identified uncorrected technical violations). If ICE determines that the employer has knowingly hired or continued to employ unauthorized workers, it will require the employer to cease the unlawful activity and may (1) fine the employer, (2) prosecute the employer criminally and/or (3) debar the employer from participating in federal contracts and from receiving other government benefits.

Monetary penalties for knowingly hiring and continuing to employ violations range from $375 to $16,000 per violation, and penalties for substantive and uncorrected technical violations range from $110 to $1,100 per violation, with more serious offenders receiving the higher penalties. ICE considers five factors in its determination of penalties: (1) the size of the business, (2) good faith effort to comply, (3) seriousness of violation, (4) whether the violation involved unauthorized workers and (5) history of previous violations.

Once the inspection is complete, ICE will notify the employer in writing with one of these most common notices:

- Notice of Inspection Results - (also known as a compliance letter) to notify employer that they were found to be in compliance.
- Notice of Suspect Documents - to notify employer that ICE has determined that identified employee(s) are unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing employment. ICE provides the employer and employee an opportunity to present additional documentation to refute the finding.
- Notice of Discrepancies - to notify employer that ICE has been unable to determine the work eligibility of identified employee(s) and requests the employer provide a copy of the notice to those employees so they may present ICE with additional documentation to establish their employment eligibility.
- Notice of Technical or Procedural Failures - to notify employer of identified technical violations, providing the employer ten business days to correct them and advising the employer that these violations will become substantive violations if uncorrected by the 10th business day.
- Warning Notice - to notify employer that ICE identified violations, but a monetary penalty was not warranted, however, there is expectation of future compliance by the employer.
- Notice of Intent to Fine (NIF) - to notify employer that they will be fined for identified substantive, uncorrected technical, knowingly hiring and/or continuing to employ violations.

Once an NIF is served, the employer has the opportunity to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO) within 30 days of receipt of the NIF. Requests for hearings result in assignment to an Administrative Law Judge (ALJ) and issuance of a Notice of Hearing and government's complaint, thus, setting the adjudicative process in motion. A large portion of OCAHO cases never reach the second stage evidentiary hearing, either because the parties reach a settlement (which must be approved by the ALJ) or the ALJ reaches a decision on the merits through dispositive prehearing rulings. If the employer

takes no action in response to the NIF, ICE will issue the Final Order.

All employers in the United States are required to have a Form I-9 on file for all employees to verify their identity and authorization to work in the United States (pursuant to IRCA). The form requires that employers execute this process upon hire of an employee, review and record the individual's original, valid identity documents and determine whether those documents reasonably appear to be genuine and related to the individual. The Rules governing the Form I-9 process changed on April 3, 2009. (For more information see our earlier Alert on this topic.)

What should you do if the government wants to inspect your Form I-9s:

- Call your immigration attorney immediately.
- Don't consent to an immediate inspection if agents show up without warning; you have up to three days to respond.
- Don't let agents take original records; provide copies.
- Don't allow officers to talk with any employees or company officers before you call your attorney.
- If Department of Labor agents show up for an inspection without notice, decline the inspection. They'll notify USCIS.
- Don't panic if USCIS discovers technical errors on Form I-9s; you have ten days to correct them. Seek the assistance of qualified immigration counsel to ensure these corrections are made properly to avoid fines.

HOW YOU CAN PROTECT YOURSELF:

Two key tools in ensuring IRCA compliance are private internal audits and specialized training. Employers should conduct private internal audits to review I-9 documents and correct any errors in advance of an inspection. This type of periodic audit can not only uncover problems early, in time to be corrected before the imposition of sanctions, but can also demonstrate the employer's good faith effort to comply with IRCA's verification requirements, a mitigating factor in ICE's penalty determination process. Because private Form I-9 audits can be performed over time and at the employer's convenience, it is less arduous for a company than the three-day audit period forced by an inspection notice. As an additional benefit, periodic audits also alert the employer to common, repeat errors made by company personnel, revealing gaps in the company's procedures or highlight areas where additional IRCA compliance training may be needed. Audits allow for the easy and early identification of problems, enabling the employer to take steps to correct them, thereby avoiding costly penalties. Many problems with Form I-9s stem from simple misunderstandings of the procedures and requirements. This can easily be rectified by having a qualified attorney train your personnel about proper procedures. Because the work environment and employee culture changes with some frequency, along with periodic legal changes impacting the Form I-9 process, refresher training courses for already "expert" personnel is also often extremely beneficial.

Although employers can select from a variety of service providers to meet their Form I-9 audit and training needs, legal professionals with experience in immigration, employment and labor law are better equipped to handle IRCA compliance issues, including audits, training and formal inspections. Fox Rothschild provides companies of all sizes with IRCA compliance training seminars and confidential, internal Form I-9 audits.

For more information regarding the information in this Alert, or if you require assistance with your company's immigration or employment issues, including IRCA compliance, social security mismatches, Form I-9s, raid planning, audits or investigations, please contact Alka Bahal, Co-Chair of Fox Rothschild's Corporate Immigration Practice Group at 973.994.7800 (immigration@foxrothschild.com) or any member of our Immigration or Labor & Employment Department Practices. Visit us on the web at www.foxrothschild.com.

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