

EMPLOYMENT LAW UPDATE

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Only the Tip of the ICEberg?

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In July of 2009, U.S. Immigration and Customs Enforcement (ICE) announced that it was embarking on a new and aggressive audit program by issuing Notices of Inspection (NOIs) to 652 businesses across the country. That represented a 23% increase over the total number of NOIs sent during the *entire* previous fiscal year. Subsequently, in November of 2009, an additional 1,000 audit notices were issued. "ICE is committed to establishing a meaningful I-9 inspection program to promote compliance with the laws. This nationwide effort is a first step in ICE's long-term strategy to address and deter illegal employment," said Department of Homeland Security Assistant Secretary for ICE, John Morton. Recently, ICE announced the impending issuance of an additional 180 NOIs directed at several southern states. According to ICE, these audits were prompted through "leads and information obtained through other investigative means."

Once served with an NOI, the employer will generally be allowed three (3) business days to produce the I-9 forms. Employers should be aware that they are required to maintain for inspection, original I-9 forms for all current employees. This form requires employers to "review and record the individual's identity document(s) and determine whether the document(s) reasonably appear to be genuine and related to the individual." As far as former employees, the I-9 forms must be kept for a period of three (3) years from the date of hire, or for one (1) year after the employee is no longer employed, whichever is longer. A completed inspection will generally issue one of three (3) findings; no violation at all; a technical or procedural violation; or a knowing violation. Monetary penalties for substantive violations (e.g. failure to produce) can range from \$110 to \$1,100 per incident. Knowingly hire and continue to employ violations can reach anywhere from \$375 to \$16,000 per wrongful incident. In arriving at penalty amounts, ICE will consider the seriousness of the violation, size of the business, whether the violation involved unauthorized workers, *good faith effort to comply*, and history of previous violations.

A company can perform a self-audit, or have a third party perform that review. When properly performed, such an initiative can not only identify potential violations for correction, but also serves as a *good faith effort* toward the intent to comply, should you end up having an "ICE" day. Many prudent employers store their I-9 forms separate and apart from the employee files. Should ICE conduct an on-site review, you are then not voluntarily providing them access to additional information outside of the initial I-9 audit scope. Stay tuned...

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