

Immigration and International Trade E-Alert Walking the Worksite Compliance Line: Employers and I-9s

07.21.10

Office of Special Counsel Actions on the Rise

Employers continue to be elevated as a key tool in the ongoing efforts of the Obama administration to increase the enforcement of our dysfunctional immigration laws. Instead of headline catching raids by Immigration and Customs Enforcement ("ICE") popular during the Bush Administration, the typical approach used now to try to decrease the hiring of undocumented workers is the use of administrative subpoenas and Notices of Inspection to review I-9 form compliance.

While the June 2010 ICE Strategic Plan reaffirmed the focus of the agency's resources on the enforcement of I-9 compliance through more aggressive audits and the application of civil and criminal sanctions, the Office of Special Counsel ("OSC") of the Department of Justice ("DOJ") has also signaled an increase in its efforts to stop discriminatory practices by employers in the I-9 process. The OSC investigates and prosecutes allegations of national origin and citizenship status discrimination in hiring, firing, and recruitment or referral for a fee, as well as, unfair documentary practices during the employment eligibility verification process and retaliation under the anti-discrimination provisions of the Immigration and Nationality Act ("INA").

Employers must do what is required but not too much in their I-9 compliance procedures. Thus, on the one hand employers must timely determine the identity and work authorization of the new employee and at the same time the employer must not demand extra documentation of that status or risk charges of discrimination. It is the typical Catch-22 situation for many.

The July 15, 2010 article in the Wall Street Journal entitled, *Policing Illegal Hires Puts Some Employers in a Bind*, by Miriam Jordan outlines the increasing difficulty for employers caught up in the political fight over illegal immigration. By September of 2010, the DOJ will have increased the number of attorneys and investigators in the OSC by 25%. On July 1, 2010, the DOJ published press releases regarding a settlement with Macy's regarding the alleged firing of a worker after a permanent resident card expired (Of course, an I-551 permanent resident card, AKA "Green Card" is only documentation of status and the status does not expire with the date on the card.) On July 8, DOJ filed a lawsuit against Garland Sales, Inc., a rug manufacturer in Dalton, GA, alleging that the company imposed more stringent employment eligibility standards on non-citizens of the United States. versus citizens. DOJ has released a video regarding worker rights and employer responsibilities under the anti-discrimination provisions of the Immigration and Nationality Act, which is available at <http://www.justice.gov/crt/osc/>.

Over \$600,000 in Immigration Fines for Texas Companies

On July 16, the *Houston Chronicle* reported that in its review of actions commenced by ICE since October of 2009, 23 Texas companies have been penalized with over \$600,000 in fines related to I-9 compliance. ICE regularly posts many of its worksite enforcement actions at www.ice.gov under News/Worksite. On June 2, ICE reported that four Houston businesses signed up to participate in the ICE IMAGE program. In El Paso in March, a temporary employment agency and two car dealerships signed up to participate in IMAGE. IMAGE is an ICE program promoted to assist employers in compliance procedures and includes the use of the E-Verify program, but the program contains its risks as well.

Avoiding Knowing Hire Violations

Knowingly hiring an undocumented worker can expose management to criminal penalties. The Filip Guidelines of the DOJ provide guidance on how a company may decrease its exposure to criminal conduct allegations. Examples of corroborative evidence of actions which can lead to criminal investigation include:

- The employer failed to request the worker to present employment eligibility documents.
- The employer did not complete a Form I-9 for the worker until after a Notice of Inspection was served on the employer.
- The employer arranged for the workers to be taken to and from work.

What to be thinking about

- What exposure does our business have to I-9 compliance and discrimination actions/penalties?
- When was our last I-9 audit?
- Does it make sense to use the Social Security Number Verification System?
- What is E-Verify and should my company enroll?
- Why are these companies enrolling in IMAGE? Should we?
- What about using electronic I-9s?
- How do we have constructive knowledge exposure concerning an employee's or an employee of a subcontractor's inability to work legally in the U.S.?

What we do

Our immigration law team, which is led by Kathleen Campbell Walker, a former national President and General Counsel of the American Immigration Lawyers Association (www.aila.org), is extremely experienced in evaluating worksite compliance protocols; establishing I-9 procedures and manuals for businesses; auditing I-9s and the hiring process; providing training programs for compliance; evaluating options for use of E-Verify, IMAGE, and the Social Security Number Verification System; assisting in the evaluation of electronic I-9 software; responding to Notices of Inspection, subpoenas; and in negotiating settlements regarding I-9 penalty exposure. We are also experienced in coordinating with criminal counsel on management exposure in the I-9 audit context as well as with allegations of discrimination by the OSC as to I-9 procedures. We look forward to assisting you.

For a complete description of the firm's Immigration and International Trade practice and a complete listing of the group's attorneys, please [click here](#).

LEGAL NOTICE

The contents of this publication are provided to you by the firm of Cox Smith Matthews Incorporated as a service to the public. As legal advice must be tailored to the specific circumstances of each case, nothing provided herein should be used as a substitute for advice of competent counsel. The contents of this publication do not constitute legal advice and are not guaranteed to be correct, complete, or up-to-date. This publication is not intended to create, and does not create, an attorney-client relationship between you and Cox Smith Matthews Incorporated, and you should not act or rely on any information in this publication. No attorney-client relationship has been created unless or until you have received a written statement from us that we represent you.

Pursuant to Department of Treasury Circular 230, this email and any attachment hereto, is not intended or written or to be used, and may not be used by the recipient, for the purposes of avoiding any federal tax penalty which may be asserted.

Address Change or to Unsubscribe. Please forward your request to Client Relations, Cox Smith Matthews Incorporated, 112 E. Pecan, Suite 1800, San Antonio, Texas 78205 USA, via telephone 1 800 749 5299, or e-mail csmealert@coxsmith.com.

ATTORNEY ADVERTISING

[Subscribe](#) | [Unsubscribe](#) | [Printable Version](#) | [Forward](#)
This email was created and delivered using [Industry Mailout](#)

AUSTIN DALLAS EL PASO MCALLEN SAN ANTONIO
coxsmith.com 800.749.5299