

Ice Inspection Hits Close to Home

Fast Food Franchisee In Fayetteville, NC Fined Over \$27,000 -- Despite Legal Workforce

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In a decision dated December 22, 2010, the US Department of Justice Executive Office for Immigration Review's Office of the Chief Administrative Hearing Officer (OCAHO) found a fast food franchisee in Fayetteville, North Carolina, guilty of I-9 violations and fined the company \$27,150. Count I alleged that the franchisee hired 11 individuals from 2006 through early 2009, yet failed to ensure that they properly completed Section 1 of the I-9 Form and/or failed itself to properly complete Section 2 or Section 3. Count II alleged that the franchisee hired 97 individuals during the same time period for whom it failed to prepare any I-9s. Penalties were sought in the amount of \$1,028.50 for each violation, for a total of \$111,078. OCAHO found that, based upon a visual inspection, the I-9 Forms for the 11 individuals named in Count I contained substantive violations, and no I-9 Forms could be produced for any of the 97 employees named in Count II. For reasons discussed below, OCAHO ultimately fined the franchisee \$27,150, approximately 25% of the penalties sought by ICE.

Never Backdate I-9 Forms

Employers should be aware that the substantive violations found in Count I were caused

in part by the ICE auditor subtly marking a Form I-9 to determine if it was later tampered with, something that the franchisee tried to do, demonstrating bad faith. In this case, the ICE auditor made “three subtle marks” to determine later whether the forms produced were backdated or completed after service of the Notice of Inspection on the franchisee in the context of the auditor simultaneously providing a sample I-9 Form and a copy of the Handbook for Employers (M-274). At that time, the ICE auditor expressly warned the franchisee’s employee not to backdate the I-9 Form if new ones were prepared. When the I-9s were subsequently reviewed by ICE, however, it was determined that they had all been completed after the Notice, and that 7 of the 11 forms were backdated with the employer attestation at Section 2 still left blank.

Factors Used by OCAHO in Setting Penalties

Turning to assessing the amount of fines to be levied, OCAHO considered the following five factors which were not given equal weight:

- Size of the business,
- Good faith of the employer,
- Seriousness of the violation(s),
- Whether or not the individuals involved were unauthorized aliens, and
- Any history of previous violations of the employer.

Each factor will be reviewed in light of the fines levied against the franchisee.

Size of Employer

OCAHO found the franchisee's relatively small size to be a mitigating factor in assessing the fines. Analyzing its number of employees, OCAHO determined that despite being part of a national fast food franchise, the franchisee was in fact a small employer with a large turnover common in the fast food industry, hence the 97 former employees.

Good Faith

Any analysis of an employer's good faith focuses first on whether or not the employer reasonably attempted to comply with its obligations prior to issuance of the Notice of Inspection. Here, OCAHO determined that:

"...there is not a scintilla of evidence that suggests [the franchisee] made any effort whatsoever to ascertain the requirements of the law...[The franchisee] made no effort at all to ascertain what the law required and lacked the reasonable diligence required: there was simply no attempt at compliance prior to the Notice of Inspection. [The franchisee's] subsequent attempts at compliance have minimal bearing on an analysis of its good faith because conduct occurring after the investigation is over is ordinarily outside the permissible scope of consideration."

It is important for employers to note that mistakes found in Section 1 completed by the employee can be attributable to the employer as the employer is obligated to ensure that the employee properly completes Section 1: "[The franchisee] not only made no effort at all to ascertain what the law requires or to conform its conduct to it, it also attempted deception by permitting employees to backdate I-9 forms, and this is sufficient to support

an assessment of bad faith.”

Further, the franchisee’s belated and disingenuous attempt to complete the I-9s by failing to attest to its own compliance in Section 2 implies an avoidance of liability for perjury.

Seriousness of the Violation(s)

OCAHO noted that a failure to prepare an I-9 at all is among the most serious of paperwork violations. As described above as a demonstration of a lack of good faith, OCAHO found the franchisee’s failure to complete Section 2 to imply an avoidance of liability for perjury.

Employees were not Unauthorized and Employer had no History of Previous Violations

None of the employees whose I-9s were involved was an unauthorized to work, nor had the franchisee a history of violations, probably mitigating the fines levied.

Mitigating or Exacerbating Factors in Assessing Penalties

Here, OCAHO took into account the depressed state of the economy and the difficulty any displaced employee would have in finding other work and reduced the penalties accordingly. As a result, the franchisee was directed to pay \$27,150 in civil money penalties and not the \$111,078 sought by ICE.

Conclusion



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Employers should be aware that they will be blamed by ICE and penalized accordingly for failing to ensure their employees are properly completing Section 1, for permitting backdating or tampering with incomplete or missing I-9s for failing to complete its Section 2. Merely employing a legal workforce will not absolve an employer from imposition of penalties if Section 1 of its I-9 Forms are not meticulously completed by the employee on day one of hire for pay and Section 2 by the employer by day three.



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