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Creating a safe harbor from immigration liability

Immigration enforcement in the workplace has become a source of unprecedented liability for U.S. employers over the past three years.

Since 2008, U.S. Immigration and Customs Enforcement (ICE) has initiated thousands of audits to review companies' records of I-9 employment eligibility forms and practices on verifying employment eligibility, and has levied stiff penalties for violations.

ICE has said in nationwide press releases that no business — large or small, whatever the industry — is immune from scrutiny.

ICE has also opened a new office in Washington, D.C., to support increased audits across the country.

Recent headlines reflect the impact of immigration enforcement on business operations. Clothing retailer Abercrombie & Fitch was fined more than \$1 million for improper immigration paperwork. American Apparel was forced to lay off more than 1,600 workers who had immigration issues, triggering an investor lawsuit against the company's officers and directors. The CEO of meat packing plant Agriprocessors was criminally charged for conspiring to harbor unauthorized immigrants, and aiding and abetting document fraud, ultimately receiving a 27-year jail sentence.

In recent cases, ICE has expanded immigration investigations to include Internal Revenue Service scrutiny of possible tax fraud and tax evasion charges relating to non-citizen employees.

In light of increasing enforcement and the potential for corporate and personal liability, now is the time to review your internal practices on employment eligibility verification and immigration compliance. Establishing clear and consistent internal policies for your company can help minimize your liability and protect you when ICE knocks on your door. The following are a few suggestions to get you on the right track:

— **Centralize internal authority for immigration issues.** Identify a key person or group within Human Resources to be responsible for all immigration issues, and make sure your key people receive professional training on I-9 compliance. These efforts will help ensure quality and consistency in your day-to-day operations of verifying employment eligibility and retaining documents for your work force.

IMMIGRATION LAW



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— **Conduct an internal I-9 audit.** Review your internal records to frankly evaluate whether your I-9 practices are in compliance with the law. Even minor technical violations frequently result in fines, which range up to nearly \$1,000 and are gauged on a per-employee basis. After identifying errors, correct them on existing I-9 forms and set internal policies to ensure proper and consistent I-9 completion in the future. Check to see whether you retain copies of employment eligibility documents with your I-9 forms, and if not, consider doing so for all employees. Also review I-9 retention policies to ensure you are not unnecessarily keeping any old, noncompliant documents.

— **Establish a response plan for Social Security "no-match" letters and other government notices.** In recent months, the government has issued a new round of "no-match" letters, pointing out discrepancies between the U.S. Social Security Administration ("SSA") records and employee information reported by employers. While these letters plainly state that they are not evidence of an employee's unauthorized immigration status, best practices demand some action when an employer receives such a letter. Establish a policy that creates a written record of your good faith communications with your employees in these situations, recommending that the employees attempt to resolve any issues with SSA and report back to you on the results of their efforts. Given ICE's current trend of enforcement against employers who have "constructive knowledge" that a worker is unauthorized, your actions to acknowledge and attempt to resolve any document discrepancies can be mitigating factors if you are audited.

— **Prepare front-line staff for a visit by ICE officers.** Make sure that all receptionists and other staff working near public entrances to your offices are aware of the possibility of a visit by ICE. Instruct staff to accept service of any documentation or notices from ICE officers, but not to allow ICE officers to physically enter your office premises, or seize or inspect any documents without a warrant. Make sure

staff members notify company executives or legal counsel immediately regarding any ICE visit and provide copies of any documents served.

— **Use legal counsel strategically.** Instead of hiring business immigration counsel on a reactive basis after ICE serves you with an inspection notice (or worse, when you wish to appeal a fine), consider engaging counsel to help you proactively establish immigration compliance policies. Counsel can train your HR managers on immigration issues to equip you to perform self-audits regularly and form response policies to government notices and letters. In the event of an ICE investigation, your internal communications with counsel regarding immigration issues may be protected by the attorney-client privilege, and critical steps may be taken prior to government inspection to identify and mitigate liability.

— **Prepare for a future of mandatory compliance, but don't jump the gun on E-Verify.** All U.S. employers will likely be mandated at some point in the future to use electronic employment verification systems such as E-Verify and the Social Security Number Verification Service. However, neither Washington state nor federal law currently requires use of these systems. ICE has launched an aggressive campaign offering incentives for employers to voluntarily enroll in E-Verify, and some large Washington companies have agreed to do so. If you are considering enrolling in E-Verify or ICE's IMAGE program (a cooperative agreement with ICE requiring E-Verify participation), keep in mind that proven data inaccuracies in E-Verify may negatively affect even a completely legal, authorized work force. Moreover, enrolling may subject your company to automatic I-9 audits and inspection, which can result in significant fines and sanctions.

While focusing on immigration compliance is important, make sure you carefully consider the risks of enrollment in voluntary government programs. If you choose to enroll, conduct a calculated review of your internal records and policies first.

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