

# Immigration Compliance in an Era of Worksite Enforcement

**Anton Mertens**

**Anna Scully**

Anton Mertens: [amertens@burr.com](mailto:amertens@burr.com)

Anna Scully: [ascully@burr.com](mailto:ascully@burr.com)

Burr & Forman LLP ● 420 North 20<sup>th</sup> Street ● Suite 3400 ● Birmingham, AL 35203

# A Look Back at 2013

- H-1B Visa Cap was reached in five days
- Comprehensive Immigration Reform died on the vine
- New I-9 form is now two pages
- Government shutdown affects processing times
- No more paper I-94 records
- DHS recognizes same-sex marriages

# Where Do We Go From Here?

- Continued H-1B cap problem
- Is immigration reform dead?
- More immigrant-friendly bills at the state level
- Increased enforcement is here to stay

# What Is This H-1B Cap Stuff?

- The job must require a bachelor's degree or its equivalent in the specific specialty as an industry minimum for an entry-level position.
- For FY2015 only 65,000 visas available plus 20,000 visas for workers with U.S.-awarded Master's degree
- File as early as April 1, 2014, for a start date of October 1, 2014
- H-1B lottery to be used just like last year

# Why Immigration Reform Is Not Imminent

- A comprehensive Senate bill looked promising in June
- No bipartisan solution for 11 million undocumented
- Emphasis on border security and interior enforcement
- House can not seem to get its act together
- 2014 is a midterm election year

# What About Form I-9 And E-Verify?

- Latest edition of Form I-9 is dated 03/08/13 and is now a 2-page form with 6 pages of instructions
- Using an outdated form is a technical violation!
- Form M-274 Handbook for Employers was also revised
- E-Verify is here to stay with over 500,000 employers enrolled and the primary focus is now enforcement

# Enforcement On The Rise

- E-Verify Monitoring and Compliance Branch to detect and deter improper use of the E-Verify program
- I-9 audits and investigations are at an all-time high
- Infosys paid a \$34 million fine to settle “allegations of systemic visa fraud and abuse of immigration process”
- An employee’s H-1B complaint could spur a widespread DOL investigation of H-1B practices

# THE FACE OF ICE





# STEP 1: THE SUBPOENA

- ICE subpoenas include all I-9 Forms onsite AND payroll records, incorporation documents, financial information, Social Security no-matches, E-Verify documentation . . . and the list goes on.
- Why do we care?

**The Subpoena is the first step toward gearing up for potential litigation against your company.**

**Documentation about your company helps respond to affirmative defense you might raise.**

## STEP 1 CONTINUED

- By law, a company is entitled to 3 days to respond to an ICE subpoena
- Why do we care?

Failure to produce an I-9 in response to a subpoena is a violation in and of itself. Each misplaced I-9 that does not end up in ICE's hands is worth as much as \$1,100.

## STEP 2: NOTICE OF TECHNICAL FAILURES

- This is ICE's way of pointing out mistakes on I-9s that it is not legally able to fine you for, but still wants you to acknowledge and deal with.
- Why do we care?

You get 10 days to make all the corrections, and any mistakes that do not get corrected to the satisfaction of Agent Fife become fair game for fines in the final notice.

# DO NOT TRY THIS AT HOME



ICE Agents, particularly Agent Fife, provide extremely vague guidelines for making corrections, and some of the corrections they want you to make can get you into trouble if the audit goes into litigation.

# STEP 3: NOTICE OF INTENT TO FINE

- All violations that ICE can fine you for will be included in the final notice, listed per employee, with a penalty amount that ranges from \$110 to \$1,100 depending on the total number of violations and any aggravating factors, such as the presence of illegal aliens and inattention to compliance obligations.
- There will be an opportunity to negotiate, but if a settlement is not reached or there is no response within a set amount of time, the notice turns into a Complaint, and litigation starts.

# DO NOT TRY THIS AT HOME



Government attorneys do not understand the rules of court procedure and will sometimes use statements you make during settlement talks against you if the audit goes into litigation.