

The ICE Fines Cometh

Law360, New York (January 5, 2011) -- No, this is not an article about the cold winter that is upon us. It is about the crackdown being implemented by the U.S. Department of Homeland Security through its primary investigative arm, Immigration and Customs Enforcement (ICE).

Created in 2003 through a merger of the U.S. Customs Service and the Immigration and Naturalization Service, ICE now has more than 20,000 employees in over 400 offices here and abroad, and an annual budget of more than \$5.7 billion. In other words, it is well staffed and funded, and likely to knock on your client's door very soon if it hasn't already.

DHS announced new worksite enforcement guidelines in 2009 that resulted in heightened scrutiny of employers' practices related to verifying employees' ability to work legally in the U.S. As part of this initiative, ICE has been busy issuing notices of inspection (NOI) to audit employers.

Just a few months ago, ICE confirmed that it would be issuing 500 to 700 new NOI's. NOI's are often followed by notices of intent to fine (NIF). Once an NIF is served, an employer only has 30 days to negotiate with ICE and enter into a settlement agreement or request a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO) of the U.S. Department of Justice.

The statistics are quite alarming for employers. Since January 2009, ICE has audited more than 3,200 employers, imposed about \$50 million in sanctions and debarred over 200 companies and individuals from working with the government. This year alone, ICE has conducted over 2,900 Form I-9 audits compared to just 1,069 I-9 inspections in 2009 and only 503 in all of 2008.

Fines assessed through an I-9 audit can be significant, depending on the type of violation in the NIF. Under the current penalty schedule, fines range from \$375 to \$14,050 if the employer is charged with knowingly hiring undocumented workers.

The amount of the fine is determined by calculating the percentage of known unauthorized workers in the company's overall work force, and can go up based upon prior violations. If an employer simply fails to keep adequate I-9 records, fines range from \$110 to \$1,100 per employee for a first offense, and where in the range depends upon the percentage of I-9 verification violations.

For example, if over 50 percent of the employees at a company haven't completed I-9's and it is a first offense, the fine is \$935 per employee. ICE also employs an enhancement matrix, looking at five additional factors, each of which could keep the fine as is (a neutral factor), or increase (an aggravating factor) or decrease (a mitigating factor) the fine by 5 percent.

The factors are: 1) company size, 2) the company's good faith efforts to comply, 3) the seriousness of the violations, 4) whether the company actually employs unauthorized aliens and 5) company history concerning previous violations. 8 U.S.C. § 1324a(e)(5).

With regard to company size, for example, OCAHO case law reflects that a business employing 66 or fewer employees typically will not be considered a large business and, therefore, the fine will not be enhanced. *United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1998) (90 to 100 employees); accord *United States v. Vogue Pleating, Stitching & Embroidery Corp.*, 5 OCAHO no. 782, 468, 471 (1995) (approximately 100 employees).

However, for an employer to obtain a 5 percent reduction of the fine, it must demonstrate it is a minimally-staffed family business. *United States v. New China Buffet Restaurant*, 10 OCAHO no. 1133, 5 (2010) (seven employees); *United States v. Hanna*, 1 OCAHO no. 200, 1327, 1332 (1990) (three to six employees).

With regard to a company's good faith efforts to comply, conduct occurring after the investigation is outside the permissible scope of consideration. *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996).

As to the seriousness of the violations, even paper violations are considered very serious. *United States v. Aid Maint. Co. Inc.*, 8 OCAHO no. 1023, 320, 354 (1999) (failure to prepare I-9 forms); *United States v. Skydive Acad. of Haw. Inc.*, 6 OCAHO no. 848, 235-246 (1996) (failure to present I-9 forms for inspection); *United States v. Task Force Security Inc.*, 4 OCAHO no. 625, 333, 341 (1994) (lack of employee signature); *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994) (lack of employer attestation).

Keep in mind that monetary fines are not the only risk. While employers and individuals who engage in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens may be fined up to \$3,000 per employee, they also may face six months of imprisonment. ICE also works with other government agencies, such as the Wage and Hour Divisions of federal and various state departments of labor, and an audit by one may lead to investigations by the others.

Complying with the federal government's I-9 requirements is not difficult or time-consuming, and the exposure for noncompliance is significant. Therefore, your clients should conduct a self audit and implement appropriate procedures immediately, before the first ICE storm arrives.

--By Steven I. Adler, Cole Schotz Meisel Forman & Leonard PA

Steven Adler (sadler@coleschotz.com) is a member in the Hackensack, N.J., office of Cole Schotz and chairman of the firm's employment law department.

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