

PUBLICATION

More I-9 Audits and Other Immigration Accountability

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February 21, 2011

Employers are facing increasing accountability concerning immigration. U.S. Immigration and Customs Enforcement (ICE) is preparing 1,000 new I-9 audits. Purchasers and states are requiring use of E-Verify. U.S. Citizenship and Immigration Services (USCIS) are double checking plenty of immigration benefits filings. The U.S. Department of Labor (DOL) is auditing attestations underlying immigration filings. People must prove and maintain lawful status to obtain driver's licenses, welfare benefits, port access cards and, increasingly, many other credentials. Even companies who only use foreign workers through staffing companies could face challenges. All of this suggests that an "immigration tune-up" may make sense for many companies and even individuals and families.

ICE is preparing to serve 1,000 I-9 audit notifications to begin a new push to hold employers accountable for verification of workers' authorization. This is reminiscent of several waves of I-9 audits and follow-up fines that occurred last year. The difference this year is that ICE has apparently hired a special group of auditors dedicated to I-9 audits and, rumor has it, they may have their pencils sharpened for finding and fining more minor errors than in previous audits. Meanwhile, ICE has levied some hefty fines for failure to keep proper I-9 records and for using electronic I-9 systems that did not work properly. ICE has also commented publicly that companies who have obtained outside audits do much better in ICE audits than companies who have only had internal audits. The U.S. Department of Human Services (DHS) just published a new version of its 65-page "Handbook for Employers," explaining how to complete Form I-9. ICE can punish employers with administrative fines (sometimes millions of dollars), debarment from federal government contracts and criminal prosecution. ICE enforcement often triggers follow-on civil lawsuits by unions or competitors for racketeering.

Some state and federal governments and some private purchasers are requiring employers to use E-Verify. A few states require all employers to use E-Verify (Arizona, Mississippi and South Carolina). Increasingly, many states require E-Verify use by any vendor contracting with the state or by any entity seeking certain incentives. The federal government requires use of E-Verify by certain contractors and subcontractors for services. Some private companies require their vendors to use E-Verify or to show that they comply with I-9 rules.

The job market is only one area where immigration verification is increasingly taking place. The U.S. Social Security Administration, state and federal welfare agencies and most states' department of motor vehicles require proof of identity and immigration status and verify against the "SAVE" database, which is essentially a mirror of E-Verify. Individuals must make sure to obtain extensions of their temporary immigration status before their current status expires in order to renew their driver's licenses, social security and welfare benefits, etc.

In adjudicating immigration benefits, USCIS and the Department of State (DOS) are making on-site visits to domestic and foreign worksites like never before, running database checks to confirm asserted facts, using extensive template requests for evidence and poring over piles of previous filings to find inconsistencies or changed circumstances. USCIS is sending requests for evidence in some cases, denying applications, revoking approvals already issued and looking for opportunities to deny collateral benefits and institute removal proceedings or prosecution when they find fraudulent filings.

Employees and unions are pushing the DOL to audit wage and recruitment assertions in H-1B, H-2A, H-2B and permanent labor certification filings. The Wage and Hour Division and the Office of Inspector General of the DOL conduct their own audits and increasingly cooperate on task forces with ICE, USCIS and DOS, often using funds collected as "fraud prevention fees" for H and L visa petitions. The DOL can impose backpay, civil penalties and debarment of the employer from other immigration-related filings, as well as cooperating with the Department of Justice for prosecution.

Even companies who only use foreign workers through staffing companies could face challenges. Many large employers complement their regular workforce with workers from staffing agencies that sometimes provide and sponsor foreign workers. The DOL, USCIS and DOS have waged a quiet war on staffing companies, including auditing their LCAs and PERMs, denying and revoking their petitions and denying their workers' applications for visas and re-entry. But these agencies may choose to turn their enforcement attention toward the "end clients" who might be shown to have conspired with staffing companies' false statements to the government by refusing to post LCAs at the actual work places or ignoring obligations of "dependent employers" to avoid displacement of U.S. workers at the end client sites.

All of this suggests that an "immigration tune-up" may make sense for many companies and even individuals and families. A simulated audit exercise by a competent lawyer may help prepare an employer or family for the real thing. Risk management analysis applies resources where there is a real risk that an area of remediable vulnerability could result in meaningful consequence. The risk is now more "real" than ever.

How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance policies and train managers and workers in implementing those policies. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's "E-Verify" or "IMAGE" programs. We defend sanctions actions by ICE for paperwork and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S. and concerning the U.S. taxation of international workers placed in the U.S. and abroad.