

PUBLICATION

ICE Will Audit 1,000 More Employers, Reveals Schedule for Fines

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ICE announced interim results for the 650 I-9 audits it announced in July and announced it has begun 1,000 new audits nationwide with a focus on critical infrastructure and specific leads. Meanwhile, ICE finally revealed its new schedule for assessing fines for "knowing" and paperwork I-9 violations arising from the audits. DHS also announced a plan to encourage employers using E-Verify to publicize that participation to customers.

New Audits Afoot. ICE's worksite enforcement efforts have exploded in the last several years. Under the Bush Administration, ICE essentially ignored I-9 civil sanctions on the rationale that employers willing to engage in knowing employment of unauthorized aliens would simply build money fines into the cost of doing business; thus, ICE focused on criminal prosecutions of employers arising from "worksite operations" (raids) of workplaces that often were disruptive of entire communities. Under President Obama, in April ICE announced a new policy to use more audits with more focus on employers and less large scale raids of undocumented workers.

In July ICE announced that it had begun 650 audits. ICE now reports that it has completed about half, with 61 employers fined a total of \$2.3 million but 267 employers still under consideration. 16 percent of I-9s reviewed have been found "suspect."

Now ICE is issuing notices to audit 1,000 more employers, who need to be prepared to act immediately. ICE typically gives 3 days for an employer to produce I-9s, although it can choose to be more flexible. Some of the employers have been chosen for audit because tips and ongoing investigations suggest the likelihood of knowing employment of unauthorized workers. Others have been chosen regardless of suspicion but because they manage "critical infrastructure" such as airports and power plants that might be targets for terrorists.

New Schedule for Fines. Meanwhile, responding to a Freedom of Information Act request by the American Immigration Lawyers Association pending since April, ICE finally disclosed the internal summary of its new schedule for assessing fines when it finds I-9 violations. In the past, ICE had calculated fines within the legal limits (up to \$1,000 for the first offense and \$2500 for a knowing violation) based on five factors: business size, good faith, seriousness, employment of unauthorized aliens, and history of compliance.

The new ICE document describes the fines process and sets forth schedules that depend on several factors:

- Knowing hire or continuing to employ vs. paperwork violations
- First, second, or third offense
- Percentage of total reviewed I-9s that have violations
- Enhancing or mitigating factors at 5% eh: business size, good faith, seriousness, unauthorized aliens, and history

For instance, an employer with 25% ol-9s containing paperwork violations and no previously fined violations would be fined \$440 per violation, which would be adjusted up 5% f being a large employer and down 10% f showing good faith with a good history, for a net of \$418 per violation. Curiously, on the other hand, a small

employer with 5% of I-9s reflecting knowing employment of unauthorized workers (including "constructive knowledge") might only be fined about \$300 per violation. We will have to wait to see whether the administrative law judge corps in the Department of Justice (the Office of Chief Administrative Hearings Officer OCAHO) will enforce this new schedule when employers start to challenge their fines rather than settle.

New Publicity Plan. On the same day, Department of Homeland Security Secretary Janet Napolitano, presiding over a conference discussing electronic employment verification, **announced the "I E-Verify" campaign** to encourage employers to publicize to potential and existing customers that they participate in the "voluntary" E-Verify system. Increasingly, employers are participating in E-Verify because of a requirement of a significant purchaser (especially the federal government or certain state governments). Whether and how to comply with such requirements, whether and how to use E-Verify without such requirements, and whether and how to demand participation by vendors requires careful analysis. At least **one group has subtly suggested** that libertarian consumers instead boycott employers using E-Verify.

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 programs, and train managers and workers in implementing those programs. 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 program. We help federal contractors design and implement E-Verify programs in compliance with Executive Order 13465 as implemented in Federal Acquisition Regulations.

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 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 Government Investigations and Litigation 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.