

EMPLOYMENT VERIFICATION

Immigration and Customs Enforcement takes its enforcement of employment eligibility verification requirements seriously, and employers need to ensure compliance with Form I-9 procedures even if they participate in the E-Verify program, McDermott Will & Emery attorney Joan-Elisse Carpentier writes in this BNA Insights article.

Carpentier looks at recent cases involving ICE sanctions against employers for I-9 violations and concludes that the agency will continue to ramp up its enforcement efforts. As a result, she recommends that employers conduct internal audits to ensure compliance in order to prepare for a possible ICE audit.

Employer Sanctions and Form I-9 Compliance

BY JOAN-ELISSE CARPENTIER

On October 30, 2013, U.S. Attorney John M. Bales of the United States Attorney's Office for the Eastern District of Texas, announced that consulting, technology, and outsourcing company Infosys Corporation had reached a settlement to pay civil fines of \$34 million in connection with allegations of systematic visa

fraud and abuse of immigration processes (7 WIR 817, 11/11/13). The \$34 million is the largest fine on record.¹

While the large sum of the fine was due primarily to Infosys's alleged abuse of the H-1B visa program and B-1 visa status, David M. Marwell, Special Agent in Charge of Homeland Security Investigations in Dallas, indicated that 80 percent of Infosys's I-9 forms contained substantive violations.² The Infosys settlement was just one in an increasingly long line of cases imposing fines for I-9 violations, underscoring the idea that the U.S. government takes visa and I-9 violations very seriously.

Form I-9: A Brief History Prior to 1986, an employer who hired an undocumented worker faced no federal penalty for doing so. While the employee could be subject to deportation, the employer could move on to the

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¹ Press release dated October 30, 2013, Department of Justice, Office of Public Affairs.

² Press release dated October 30, 2013, Department of Justice, Office of Public Affairs.

next worker and hire him/her without worrying about legal status or facing fines or sanctions.

In 1986, the Immigration Reform and Control Act (IRCA) was passed, creating rules which subject employers to civil and criminal penalties for knowingly hiring or continuing to employ an unauthorized worker.³ As a tool to assist employers in identifying and hiring only those authorized to work in the U.S., and as a means for the government to monitor employers' hiring practices, the Employment Eligibility Verification Form I-9 was created.⁴

Failure to comply with the I-9 record keeping requirements subjects an employer to potential civil and criminal penalties.⁵ The employer is required to begin the I-9 verification procedure by the first day that the employee begins work and complete the verification process no later than three business days after commencement of employment. The form is not filed with any U.S. government agency, but must be kept on file by the employer during the course of the employee's employment.

For those persons who are no longer employed by the employer, Form I-9 must be retained for at least three years from the date of hire, or for one year after the employment has ended, whichever is later. The employer must be able to present the completed form upon request by the U.S. government in an I-9 audit or inspection process, described below.

Since IRCA first became law more than 25 years ago, Form I-9 and its underlying regulations have undergone many changes. There are complex rules regarding what documents are acceptable to demonstrate identity and work authorization, when receipts may be acceptable, when re-verification is necessary, and what fines and sanctions will be imposed.

While the government was initially slow to begin auditing and fining employers for noncompliance with the provisions of IRCA, essentially providing an informal grace period for employers to understand and comply with the new rules, by 1989 the first employer sanctions case had been litigated.⁶ Compliance with the provisions of IRCA is now fully in force. It is clear that Immigration and Customs Enforcement is determined to enforce I-9 regulations.⁷

³ The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

⁴ 8 C.F.R. § 274a.2(a)(2).

⁵ Note that IRCA exempts from its provisions employment of unauthorized workers hired on or before November 6, 1986, the date of enactment of the law. The grandfather provision only covers such employees who continue in their employment. A break in employment and rehire by the employer requires completion of Form I-9.

⁶ *Mester Mfg. Co. v. Immigration & Naturalization Serv.*, 879 F.2d 561, 4 IER Cases 761 (1989).

⁷ I-9 enforcement was previously handled by the Immigration and Naturalization Service. Under the Homeland Security Act of 2002 (Pub. L. No. 107296, 116 Stat. 2135) the legacy INS was dissolved and reorganized into three components, one of which is Immigration and Customs Enforcement.

I-9 Audit or Inspection Procedure. Any employer can be targeted for an I-9 audit or inspection, but many audits are driven by tips provided by former or current employees, members of the public, and other government agencies. Additionally, certain industries are targeted for audits because they have historically employed large numbers of undocumented workers.

Targeted industries have included manufacturing, food and beverage (including food processing and restaurants), hospitality and construction, among others.

The audit is initiated by ICE by serving the employer with a Notice of Inspection. The NOI must provide the employer with three days' notice for the actual inspection.⁸ The NOI may require the employer to present I-9s for all current and terminated employees, a list of all current and terminated employees with hire and termination dates and other identifying information, payroll records, tax statements and other corporate documents. The employer will also be asked whether it participates in the E-Verify program (described below).

While the employer may be able to waive the three-day notice and allow inspection immediately, best practice is to take the full three days to collect and review all materials requested for inspection. The employer may contact ICE to arrange for a specific date and time convenient for the employer. While ICE has an absolute right to inspect on its selected date, in many cases ICE will work with the employer to arrange a reasonable date.

At the actual inspection, the inspector will review the I-9 forms for completeness and accuracy and will compare the forms against payroll records to ensure that an I-9 has been completed for each employee hired after November 6, 1986. The inspection may be conducted on more than one day if the employer has a large workforce and/or if the inspector requests additional records at the initial inspection.

An inspection may result in the issuance of three types of findings:

(1) If the employer is found to be in compliance, with no issue of knowingly hiring or continuing to employ an unauthorized worker and no technical violations, a Notice of Inspections Results will be issued. The Notice will indicate that the employer is in compliance and no further inspection activity will occur.

(2) If paperwork violations are found, the inspector can elect not to fine the employer, particularly if there is an expectation of future compliance.⁹ The inspector will issue a Warning Notice instead. In the case of a Warning Notice, a date will be set for a follow up in-

⁸ 8 CFR § 274a.12(b)(2). ICE may obtain a warrant if it has probable cause, thereby overriding the requirement for three days' notice.

⁹ While inspectors may exercise discretion in determining when and how much to fine, an inspector will fine whenever there are violations concerning employment of unauthorized workers.

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spection. If the employer is found to be compliant at the follow up inspection, no further action will be taken.

(3) If the inspector finds substantive violations, a Notice of Intent to Fine will be served on the employer. A NIF will typically be issued where the employer is being charged with knowingly hiring or continuing to employ an undocumented worker or where the technical paperwork violations are so serious that they could have resulted in the hiring of an unauthorized worker.¹⁰

During the course of the I-9 inspection process the employer may challenge certain aspects of the process, if the employer believes applicable regulations have not been followed. Following issuance of the NIF, the employer may attempt to negotiate a settlement with ICE within 30 days of service.

If the employer and ICE do not reach a settlement agreement, the employer can request a hearing before the Justice Department's Office of the Chief Administrative Hearing Officer, where the matter will be heard before an administrative law judge. If the employer takes no action, ICE's NIF becomes final.

As discussed below, many I-9 audits now result in fines with a trend towards fining at the highest levels. Many employers have been successful in negotiating lower fines before OCAHO under certain conditions. If a favorable settlement cannot be negotiated with ICE or before an ALJ through OCAHO, the employer may file suit in federal court to challenge the fine.¹¹

What Results in a Fine? As indicated above, the provisions of IRCA are enforced by I-9 audits or inspections conducted by ICE. Under current regulations, employers can be fined for two types of violations: (a) technical or paperwork violations concerning completion of Form I-9; and (b) knowingly hiring undocumented workers (or engaging in other related egregious conduct).

Paperwork violations typically involve an employer's carelessness in completing Form I-9 by not completing sections, leaving out dates, neglecting to sign and date the form, neglecting to have the employee sign and date the form, accepting incorrect documents or inaccurately transcribing information from the documents, and other similar technical issues.

Paperwork violations are subject to civil penalties of \$100 to \$1,000 for each violation.¹² A separate penalty of \$110 to \$1,100 can be imposed for each individual for whom a Form I-9 has not been kept for the requisite statutory period or for whom employment eligibility has not been verified. In assessing civil fines, the following factors are considered: (1) the size of the business; (2) the good faith of the employer; (3) the seriousness of the violation; (4) whether or not the individual was an unauthorized worker; and (5) the employer's history of previous violations.¹³

Civil penalties can also be imposed for knowingly employing or continuing to employ an unauthorized

worker. The fine for a first offense can range from \$275 to \$3,200 for each unauthorized worker. The fine for a second offense can range from \$2,200 to \$6,500 for each unauthorized worker. The fine for each offense after a second offense can range from \$3,300 to \$16,000 for each unauthorized worker.¹⁴

It is obvious that civil penalties can quickly multiply when an employer has not taken care to properly complete and maintain its I-9 records. The situation can become far worse if it is determined that an employer has hired undocumented workers, as constructive knowledge can be imputed in situations where the employer's technical paperwork violations are such that they have resulted in employing or continuing to employ an unauthorized worker. Criminal sanctions can also be imposed if ICE determines that an employer has engaged in a "pattern or practice" of knowingly hiring or continuing to employ unauthorized workers.¹⁵

In 2006, ICE began an aggressive approach to I-9 violations involving employment of unauthorized workers by electing to bring criminal charges against such employers. Under certain circumstances ICE has not only instituted larger criminal fines, but has also brought criminal charges such as harboring illegal aliens, money laundering and tax and document fraud in addition to charges of knowingly hiring or continuing to hire illegal workers. Such charges can result in a prison sentence of up to 20 years, depending on the charges.

For example, in January 2014, ICE reported on the arrest and indictment of 32 people in Texas and Louisiana charged with racketeering and immigration violations in a scheme to recruit undocumented workers to work in Chinese restaurants (8 WIR 139, 2/17/14).¹⁶ In March 2014, ICE announced the sentencing of a Maine restaurant manager to 14 months in prison following three years of supervised release and IRS restitution of \$54,288 for harboring undocumented workers and conspiracy to file false employer's quarterly federal tax returns. (8 WIR 271, 4/14/14). The restaurant manager hired a workforce more than 50 percent of which was comprised of undocumented workers who were paid "under the table with cash generated illegally by the employment of undocumented aliens."¹⁷ While criminal charges are an unusual result in a typical I-9 inspection, employers need to be aware that they will be held responsible for any conduct considered egregious by ICE.

As demonstrated in the case in Maine, the term "employer" as defined in the regulations means that sanctions, including civil and criminal penalties, can be brought against an individual who is acting on behalf of the employer in doing the actual hiring or I-9 verification.¹⁸ While corporate officers, agents or anyone acting in the interest of the employer can be personally fined, lower level employees typically are not targeted.

¹⁰ Note that an interim Notice of Discrepancies or Notice of Suspect Documents may also be served on the employer during the course of the inspection.

¹¹ The employer may also elect to challenge the I-9 inspection process and various aspects of the process during the audit phase. Any challenges should be carefully considered and carefully monitored since failure to comply with an I-9 inspection notice will result in large fines.

¹² Immigration and Nationality Act § 274A(e)(5).

¹³ 8 U.S.C. § 1324a(e)(5)

¹⁴ 8 C.F.R. § 274a.10(b)

¹⁵ INA § 274A(f)(1).

¹⁶ ICE News Releases dated January 30, 2014, "Arrests made throughout Texas and Louisiana following RICO indictment of 32 in an employment referral conspiracy involving Chinese restaurants."

¹⁷ ICE News Releases dated March 26, 2014, "Fairfield woman sentenced to 14 months on harboring aliens, money laundering and tax charges."

¹⁸ 8 C.F.R. § 274a.1(g).

Recent Cases. In an effort to ensure that employers comply with the I-9 rules and hire only authorized workers, ICE has increased its efforts with respect to I-9 audits and sanctions.¹⁹ While the Infosys case demonstrates punishment for the most egregious conduct, including violations of specific visa laws and regulations, other cases have focused purely on I-9 conduct. Though employers need to be aware of the Infosys case and the ramifications of not following the visa rules, those cases which focus solely on I-9 violations are likely more applicable to most employers.

In 2010, ICE announced a fine settlement of \$1,047,110 with retailer Abercrombie & Fitch following a 2008 audit in its Michigan stores (4 WIR 577, 10/4/10). The Abercrombie & Fitch case is notable not only for the size of the fine, but also because the fine was imposed based on technology-related deficiencies in the company's electronic I-9 verification system.²⁰ Moreover, there were no instances of knowingly hiring unauthorized workers uncovered during the audit, with ICE basing the fine solely on technical paperwork violations.

In its news release ICE stated, "ICE is focusing its resources on the auditing and investigation of employers suspected of cultivating illegal workplaces by knowingly employing illegal workers. In the last year, ICE has leveled a record number of civil and criminal penalties against employers who violate immigration laws."²¹

In February 2014, OCAHO upheld a \$77,000 fine imposed by ICE against an Indian restaurant located in Georgia for I-9 violations with respect to failure to properly complete the I-9 for a number of employees and knowingly hiring unauthorized workers.²² In March 2014, OCAHO upheld a fine of \$238,300 imposed against a masonry company for I-9 violations, including failure to properly complete a Form I-9 for many employees and failure to complete an I-9 at all for many others.²³ These cases underscore the willingness of OCAHO to uphold significant fines where it sees egregious conduct on the part of the employer.

Though ICE is moving to hold employers accountable and impose higher fines for I-9 violations, OCAHO has shown willingness to lower fines in certain cases. In applying the standards outlined in 8 U.S.C. § 1324a(e)(5), in *United States v. New Outlook Homecare, LLC*, 10 OCAHO No. 1210 (February 11, 2014), OCAHO reviewed ICE's proposed penalty of \$21,599. Noting the small size of the employer, OCAHO found that ICE's proposed penalty of 85 percent of the maximum permissible was unduly harsh, imposing instead a fine of \$9,450.

¹⁹ Report of Office of the Inspector General, Department of Homeland Security, final report on U.S. Immigration and Customs Enforcement's Worksite Enforcement Administrative Inspection Process (February 11, 2014) p. 4, noting that from Fiscal Year 2003 to 2008 ICE imposed fines of \$1.5 million. Under the 2009 guidelines, from Fiscal Year 2009 to 2012, ICE imposed fines of \$31.2 million.

²⁰ ICE News Releases dated September 28, 2010, Detroit, Michigan, "Abercrombie & Fitch fined after I-9 audit."

²¹ *Id.*

²² *United States v. Symmetric Solutions, Inc. d/b/a Minerva Indian Cuisine*, 10 OCAHO No. 1209 (February 6, 2014).

²³ *United States v. M&D Masonry, Inc.*, 10 OCAHO No. 1211 (March 11, 2014).

Likewise, in *United States v. Kobe Sakura Japanese, Inc.*, 10 OCAHO No. 1205 (October 18, 2013, amended October 31, 2013), OCAHO reduced a proposed fine of \$32,398 to \$15,600, citing the small size of the family run business (7 WIR 860, 11/25/13). Though OCAHO agreed with ICE that Kobe's backdating of I-9 documents was a serious offense, the ALJ cited *United States v. Snack Attack Deli, Inc.*, 10 OCAHO No. 1137 (December 22, 2010), in determining that a fine is not intended to cause employees to lose their jobs or force an employer out of business.

In *United States v. Pharaoh's Gentleman's Club, Inc.*, 10 OCAHO No. 1189 (July 18, 2013), OCAHO found that the employer's financial hardship concerning a \$5 million personal injury lawsuit brought by an individual hit by a drunk driver should be taken into account in determining the fine for I-9 violations. OCAHO further found that ICE's proposed fine of \$38,335 was more than a third of the company's undistributed profits and therefore was unduly harsh. The fine was reduced to \$17,500.

Is E-Verify the Answer? Recent decisions imposing large fines and criminal charges in I-9 verification cases have led many employers to seek more certain ways of conducting their I-9 verification. The government encourages employers to use its E-Verify program.

The E-Verify program was instituted in 1996 as an online program to assist employers with the I-9 process. Employers that are registered for the E-Verify program can check data provided on the Form I-9 against the Social Security Administration, Department of Homeland Security and State Department databases to determine the accuracy and authenticity of the documents and information presented on Form I-9. The employer and employee must prepare an I-9 form, but the employer can check the information on the aforementioned databases.

If there is a mismatch, the system will return a "Tentative Nonconfirmation" that explains the mismatch. The employer is required to review the findings with the employee and provide the opportunity for the employee to contest the mismatch. An employee who contests the mismatch must resolve the issue within eight working days from the date of referral.

Participation in E-Verify is voluntary for most employers, though employers that are government contractors and those located in certain states are required to participate. An employer that is not required to participate in E-Verify can opt out at any time. Initially conceived as a pilot program for a limited period of time, E-Verify has been upgraded over the years and has been extended several times, most recently through September 30, 2015 (6 WIR 617, 10/1/12).²⁴

E-Verify is a controversial program, though the government encourages employers to participate. Criticism of the program includes the burden of initial registration on the E-Verify system, which can be time consuming and confusing. Upon registration the employer must review and sign a Memorandum of Understanding which includes, among other things, a requirement to provide the Social Security Administration and the Department of Homeland Security with information concerning the employer representatives who should be contacted concerning E-Verify.

²⁴ Pub. L. No. 112-176, 126 Stat. 1325 (September 28, 2012).

Once registered, E-Verify places an additional administrative burden on the employer since it is essentially an extra step in the I-9 verification process. Other employers complain of TNCs that are later favorably resolved, but delay the process of hiring key employees.

It is important to note that E-Verify does not provide a safe harbor for employers with respect to I-9 violations. An employer is still held accountable for completion of the actual I-9 form. Additionally, E-Verify does not guarantee a legal work force. An employee may present fraudulent documents which cannot be detected through either I-9 completion or verification within the E-Verify system.

However, there are two benefits to using the E-Verify system. There is a rebuttable presumption that an employer who obtains the appropriate confirmation through the E-Verify system has not engaged in knowingly hiring or continuing to hire an unauthorized worker. Moreover, an employer who uses E-Verify cannot be held civilly or criminally liable for any action taken under good faith reliance on information provided through E-Verify.

Going hand in hand with E-Verify, in 2006 ICE announced a new program known as the ICE Mutual Agreement between Government and Employers (IMAGE) program. IMAGE was created to enable employers to follow certain guidelines to police themselves, thereby freeing the employer with respect to the specter of the I-9 inspection and allowing ICE to concentrate its efforts on other businesses.

Among other things, participation in IMAGE includes an initial ICE I-9 audit, use of E-Verify, institution of in-house training programs, annual internal I-9 audits, and a self-reporting system for violations. As with E-Verify, participation in IMAGE is voluntarily and currently has not garnered a great deal of interest.

What Will the Future Bring? Several new developments provide insight into where the I-9 inspection process may be headed. In February 2014, the Office of the Inspector General, Department of Homeland Security, prepared a final report on ICE's work-site administrative inspection process (8 WIR 155, 3/3/14).

The report included facts and figures concerning the number of inspections, fines imposed and ultimate disposition of the fines. The report highlighted the discrep-

ancy in how inspections were handled and disposed of in five field offices: Chicago, Denver, Los Angeles, Miami and New Orleans.

For example, in Chicago less than 30 percent of I-9 inspections resulted in issuance of a warning, while in New Orleans, in almost 80 percent of inspections a warning was issued rather than a fine. The report ended with three recommendations: (1) ICE should enforce its oversight procedures to ensure consistent application of the inspections process; (2) ICE should develop a process to evaluate the effectiveness of the inspections process and modify the process based on evaluation; and (3) ICE must direct field offices to provide consistent, accurate and timely reporting and reconciliation of information on worksite enforcement strategy administrative inspections. It should be noted that ICE concurred with recommendations (2) and (3), but did not concur with (1), indicating that discrepancies in how ICE audits and fines employers are necessary due to regional needs such as mission priorities, resources and local socio-economic characteristics.²⁵

ICE continues to encourage use of the E-Verify program, as do many lawmakers. It is anticipated that in the future, E-Verify may become mandatory for all employers in all states. Until then, E-Verify remains voluntary for the majority of employers who should carefully consider the benefits and inconveniences of the system before electing to opt in.

What programs will be instituted and required in the future remains uncertain, but it is clear that ICE will continue to expand its I-9 enforcement procedures. Employers should prepare themselves in advance for an I-9 inspection by ensuring that they are I-9 compliant.

Internal measures should be taken to develop an I-9 compliance policy and ensure that employees and company representatives who conduct I-9 verification are well trained and remain current on all procedures. Employers should regularly conduct in-house self-audits. If an employer receives notification of an upcoming I-9 inspection by ICE, the employer should consider its legal obligations and seek counsel where appropriate.

²⁵ See http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-33_Feb14.pdf.