

## IMMIGRATION LAW

## Expert Analysis

# Preparing for I-9 Audits Under the Trump Administration

The federal government's employment eligibility verification form (Form I-9) is a seemingly simple form whose completion is, in fact, fraught with pitfalls for the unwary employer. Since the inception of employer sanctions in the mid 1980s, government investigations of employers' I-9 compliance have been a key part of both Democratic and Republican administrations' efforts to combat unauthorized immigration.

Three factors are now combining to increase corporate I-9 risk: (1) The Trump Administration has issued policy directives to enhance "interior enforcement" and has proposed budget increases for Immigration and Customs Enforcement (ICE) to give it the resources to achieve these policy objectives; (2) recent statutory increases to civil fines for both I-9 noncompliance and I-9-related anti-discrimination violations make even "paperwork errors" a more expensive proposition, and (3) federal prosecutors are showing an increased interest in proceeding criminally against employment verification failures.

President Trump, in his Buy American and Hire American Executive Order

LISA M. KOENIG is a partner at Fragomen, Del Rey, Bernsen & Loewy. PATRICK SHEN and DAN BROWN, partners in Fragomen's government strategies group in Washington, D.C., assisted in the preparation of this article.

By  
Lisa M.  
Koenig



(E.O. 13788 of April 18, 2017, published at 82 Fed. Reg. 18837 (April 21, 2017)), directed the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security to protect the interests of U.S. workers in the administration of the immigration system, including through the prevention of fraud or abuse.

This Executive Order follows an earlier one titled Enhancing Public Safety in the Interior of the United States (E.O. 13768 of Jan. 25, 2017, published at 82 Fed. Reg. 8799 (Jan. 30, 2017)), pursuant to which Department of Homeland Security (DHS) Secretary John Kelly called for a hiring surge of 10,000 ICE agents to focus on the criminal and civil enforcement measures associated with the Order. Hiring 10,000 new ICE agents against a backdrop of other intended government cuts and hiring freezes demonstrates that the administration intends to put in place a strong infrastructure that will be able to take on these challenges. We encourage employers to review their internal I-9 program, so that they can

best implement appropriate processes and procedures for I-9 compliance, as an increase in worksite inspections is inevitable.

Notably, the Obama Administration had already set in place a more robust framework on worksite enforcement, including increased penalties that went into effect last year, that represented an increase by 96 percent in the fines that could be assessed against employers in instances of substantive or "paperwork violations." For example, the civil pen-

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alty range for 100 I-9s completed after the three-business-day deadline for completion increased from \$11,000-\$110,000 to \$21,600-\$215,600. The civil penalty for knowingly hiring 10 unauthorized workers increased from \$3,750-\$32,000 to \$5,390-\$43,130. Further, a new version of the Form I-9 went into effect in January of this year, that incorporates "smart" technology. To address these changes,

and provide employers with more guidance, U.S. Citizenship and Immigration Services (USCIS) also released a now-expanded 64-page Handbook for Employers to provide employers more hands-on guidance on how to properly prepare Forms. (M-274 Handbook for Employers). While the completion of Form I-9 would appear seemingly straightforward, these additional developments certainly suggest otherwise. Thus, it is critical that employers not underestimate the importance of maintaining a compliant program.

### Compliance Program

In light of the increased I-9 liability and enforcement focus, it is critical that employers have an immigration compliance program that incorporates the factors for an effective program set forth in the U.S. Federal Sentencing Guidelines. Such a compliance program includes an assessment of the company's most significant immigration-related risks, a compliance program that addresses those risks, and an audit function that confirms that the company's compliance procedures are being followed.

It is prudent to consult outside counsel to ensure that the immigration compliance program meets these objectives, as significant reductions in corporate liability are available when isolated misconduct occurs but a generally effective compliance program is in place.

### Bases of Legal Liability

Employers face civil liability for failure to complete an I-9 Form properly, 8 U.S.C. 1324a(b), for hiring or continuing to hire an individual knowing that the individual is unauthorized to work, and for entering into a contract with an entity for the labor or services of a worker knowing that the worker to be supplied is unauthorized. 8 U.S.C. 1324a(a). In each instance where "knowledge" is required, ICE can meet its burden by showing that the employer had

"constructive knowledge" based on the specific facts and circumstances of the case. 8 CFR 274a.1(l). There is a criminal misdemeanor penalty for a "pattern and practice" of such knowledge, 8 USC 1324a(f)(1), and a criminal felony penalty for knowing acceptance of a false document for purposes of satisfying an I-9 requirement. 18 U.S.C. 1546(b).

There is also civil liability for an employer that: (1) intentionally discriminates in the employment verification process on the basis of citizenship status against U.S. citizens, permanent resident aliens, or asylees and refugees, by failing to hire or unlawfully terminating them, 8 U.S.C. 1324b(a)(1), and (2) for an employer that requests more or different documents than are required to satisfy the Form I-9 from any individual. 8 U.S.C. 1324b(a)(6).

### Ensure Audit-Readiness

Enforcement of the prohibition against unlawful employment is typically initiated by an ICE Notice of Inspection (NOI) of a company's Forms I-9. Enforcement of the anti-discrimination rules is typically initiated by a Department of Justice (DOJ) request for a variety of hiring related documents, including an employer's Forms I-9. A key aspect of preparation for an I-9 audit lies in understanding how audits work, and mitigating risk by ensuring that a well-communicated policy is in place. The policy should assure, among other things, that all new employees' employment eligibility is verified by the timely completion of an I-9, and that company employees administering the I-9 process are properly trained. In order to best prepare for audits, it is important to understand the key triggers that initiate an ICE or DOJ audit of a company. A company may be targeted for an audit where ICE focuses on a certain industry that is widely known to employ an undocumented workforce. Other audits may be based upon a tip received by the government, or in the

case of anti-discrimination cases by a complaint from an individual claiming to be aggrieved by an unfair immigration-related employment practice.

**Anatomy of an Audit.** An ICE audit starts when an ICE officer shows up unannounced to an employer's premises with a Notice of Inspection (an administrative subpoena). The Notice will demand that an employer produce I-9s for its workforce, as well as supporting materials such as payroll records, I-9s, and verifying documents if the employer has a practice of keeping those. When faced with an audit, an employer should use the three business days afforded by the ICE regulation, but the facts and circumstances might require that additional time be allowed so that the inspection is "reasonable" within the statute and the Fourth Amendment. This additional time enables the employer to locate its I-9s and then make corrections, which in turn will help to reduce potential fines.

**Request for Documents.** The ICE investigator will first review the I-9s to determine if a properly completed I-9 exists for each employee, and if there are violations, the investigator will determine a level of fines based upon the findings. Even for employers that traditionally have not had a history of employing an undocumented workforce, it is common to see patterns of finable activity, including failure to reverify, paperwork violations, and even missing I-9s for currently employed workers. The ICE audit might end with no finding of violation, or a list of corrections that the employer must make, or in a modest civil paperwork penalty. It is possible that the employer will receive a "Notice of Suspect Documents" if certain employees appear to ICE to be unauthorized, to which the employer must respond promptly. A "Notice of Intent to Fine" document is sometimes issued that articulates the findings of the ICE agent in evaluating the employer's poor

compliance level. The fines are assessed on a per I-9 basis. Therefore, employers with a sizable workforce, and some substantive violations, may face potential liability in the millions of dollars. Negotiation of the NIF amount is possible, and a hearing before an administrative law judge is available if the proposed fine amount cannot be resolved by negotiation with ICE. An ALJ's determination may be judicially reviewed.

In light of this liability, it is wise for employers, pursuant to their immigration compliance plan, to conduct regular internal I-9 audits. Regular internal audits serve two essential functions. First, they afford the employer the ability to take a high level view, and address any patterns or deficiencies that are inherent in its current process. Second, they afford the employer the ability to correct many of the violations, where permissible, in advance of an actual audit. The employer is permitted to correct its portion of the I-9s after the fact, so long as the information is not back-dated, and in so doing, the employer can reduce any potential fines, as well as displaying good faith in the process. An ICE investigator will factor this good faith into account in assessing an employer's overall fines in addition to other factors including the size of employer, and any prior infractions. Similarly, a DOJ lawyer investigating discrimination allegations will look favorably upon employer efforts to monitor and remediate I-9 practices that might prevent otherwise work-authorized individuals from obtaining or maintaining employment.

### Employer Considerations

An effective internal audit can yield important insights for an employer into the state of its current I-9s, and a deeper understanding as to the cause of any deficiencies. Given the enhanced enforcement focus, doubled civil fines, and potential criminal liability, the audit

task should be assigned to capable individuals—whether in-house or outside the company.

While a spot audit can certainly be helpful in identifying regular mistakes and patterns present in an employer's I-9 population, an actual I-9 audit would typically survey the entire population, rather than just a percentage of the workforce.

Interestingly, in its most recent Guidance for Employers Conducting Internal Employment Eligibility Form I-9 Audits, ICE advises that "the employer should carefully consider how it chooses Forms I-9 to be audited to avoid discriminatory or retaliatory audits, or the perception of discriminatory or retaliatory audits."

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It is important to ensure that the internal audit is a part of an immigration compliance program that is sensitive to the company's particular immigration-related risks. Vulnerabilities in the program identified by the audit should be properly evaluated, and recurring errors should be rectified by an improvement in process.

If an employer participates in E-Verify, or is a federal contractor, the compliance stakes increase, and the need for regular audits is elevated. E-Verify records every I-9 transaction engaged in by the employer, to which ICE has access without the need for a Notice of Inspection or other notice to an employer. Federal contractors face potential suspension or debarment for significant I-9 noncompliance, and a regular internal audit allows employers

to identify and remedy any problems in advance.

Finally, it is important for employers to conduct adequate due diligence when considering electronic I-9 software programs that may be add-on modules to their existing human resource information systems. Regardless of whether an employer chooses to maintain paper I-9s or stores them electronically, the program must still adhere to certain recordkeeping standards, and technical safeguards that track the I-9 regulations and agency guidance. Retailer Abercrombie & Fitch was fined \$1 million in 2010 due to deficiencies found in its electronic I-9 systems, even though ICE did not find that the company had knowingly hired any undocumented workers. A deficient I-9 software program potentially increases corporate liability every time an I-9 is created or updated, and potential civil fine liability in the millions of dollars is not uncommon.

### Conclusion

Given the renewed enforcement focus by both ICE and DOJ on immigration compliance, the nearly doubled civil fines available to both agencies, and the potential criminal liability for employment verification misconduct, employers are well advised to establish or strengthen their immigration compliance programs, and to ensure that regular I-9 audits are a feature of such programs.