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I-9 Audit Alert: New Enforcement Risks for Employers

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We have observed a consistent and concerning shift in enforcement patterns over the past several months. In a Recent Fact Sheet, U.S. Immigration and Customs Enforcement (ICE) worksite enforcement to steps to increase legal exposure for employers that would warrant immediate attention. See the following Fact Sheet: <https://www.ice.gov/factsheets/i9-inspection>.

Historically, after serving a Notice of Inspection (which initiates a formal I-9 audit), ICE would typically follow up with a Notice of Suspect Documents. That second notice provided employers with a defined period (usually 10 days, and often negotiable) to reverify affected employees and, where necessary, take appropriate employment action.

More recently, however, ICE appears to be bypassing this step entirely. Instead of issuing a Notice of Suspect Documents, the agency is using information gathered during I-9 audits, including copies of employee documentation, to support criminal warrant applications and conduct enforcement actions, including workplace raids. We have seen this ongoing pattern in a number of recent cases.

In addition to a significantly expanded interpretation of what constitutes a "substantive violation" (i.e., finable offenses), this shift reflects a broader and more aggressive enforcement strategy. ICE is increasingly using I-9 audits not just for administrative or civil penalties, but to (1) identify undocumented workers for potential removal proceedings; and (2) pursue criminal charges against employers who may have accepted fraudulent documentation, even in cases where employees were cleared through E-Verify.

Given these developments, we recommend that your company take proactive steps to assess and strengthen its compliance efforts:

1. Conduct internal audits of existing I-9 forms to confirm proper completion. Where errors are identified, ensure they are corrected in accordance with regulatory guidance, and provide targeted training to prevent recurrence.
2. Continue retaining copies of employee documentation but ensure that relevant personnel are trained to reasonably identify and reject fraudulent documents. During internal audits, flag any documentation that raises concerns and develop a plan to address potential risk areas (e.g., phase out undocumented workers and phase in new employees through a more vigorous compliance program).

3. Review your electronic I-9 systems to confirm full compliance with applicable regulations, including audit trails, signature protocols, record retention standards, etc.
4. Evaluate current E-Verify practices to ensure consistent and accurate usage and reinforce compliance through training and internal controls. Remember, building upon item B above, Section 2 is signed under penalty of criminal law. Too many HR professionals take the position that they'll complete the I-9s and then run the information through E-Verify to double-check the underlying documentation (as opposed to reviewing them carefully upfront).

With this recent Fact Sheet, ICE appears to be on the verge of long-promised expansion of its worksite efforts. The purpose of this alert is to ensure the business community will be prepared.

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