

Here Comes the ICE Storm

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Enforcement! Ask any immigration lawyer or foreign national the first word they think of when someone says “Trump,” nine times out of ten it will be “enforcement.” We are at the dawn of a new era of increased immigration enforcement. Decades ago the government settled immigration related violations against Walmart for \$11 million.

Around the same time, Immigration and Customs Enforcement (ICE) conducted a massive raid involving the harboring of undocumented immigrants at Agriprocessors, a meat packing plant, resulting in multi-year prison sentences for several managers.

From that time, until Donald Trump’s first Administration, widespread enforcement of workplace immigration violations was a rarity. During Trump’s first Administration ICE I-9 worksite investigations soared 300 percent and the Department of Justice (DOJ) became empowered to audit the hiring practices of companies that sponsored immigrants for lawful permanent residence (colloquially know as “green cards”), which recently resulted in the DOJ’s \$25 million settlement with Apple.

Trump’s new Administration absolutely has ICE enforcement at the top of its agenda. There already have been worksite enforcement actions around the country, including Philadelphia, Cleveland, Chicago, and New York, with reported arrests of over 8,000 individuals.

On Jan. 21, 2025, Acting Department of Homeland Security (DHS) Secretary, Benjamin Huffman, rescinded an Obama-era policy memorandum that limited ICE’s enforcement actions in or near



Photo: Christopher Dilts/Bloomberg

US Immigration and Customs Enforcement (ICE) agents, along with other federal law enforcement agencies, attend a pre-enforcement meeting in Chicago, Illinois, US, on Sunday, Jan. 26, 2025.

“protected” or “sensitive” areas such as schools, hospitals, places of worship, or social services establishments, thereby eliminating any protections that these establishments were previously granted.

President Trump has also encouraged the Secretary of the DHS to form closer partnerships with state and local law enforcement agencies to increase immigration enforcement capabilities. Shortly after, Attorney General Pam Bondi, ordered the DOJ to pause funding to “[s]o-called ‘sanctuary jurisdictions’[.]”

Viewed collectively, these recent directives indicate that immigration enforcement actions, including Form I-9 Audits by ICE and Homeland Security Investigations (HSI), will become increasingly more

prevalent, further underscoring the importance of employers confirming their compliance with federal immigration and employment laws.

Form I-9 and the Employment Verification Laws

By way of background, the 1986 Immigration and Reform and Control Act ("IRCA") requires employers to verify the identity and employment eligibility of all employees hired on or after Nov. 7, 1986. IRCA penalties include criminal and civil sanctions for both substantive and technical violations. The I-9 Form is used by employers as a means to document employment verification.

The law requires the employee to complete Section 1 of the form by the date of hire and the employer to complete Section 2 of the form within three business days of the date of employment. Employees must present either a List A document, establishing both their identity and employment authorization, or a List B document, establishing their identity, and a List C document, establishing their employment authorization. The employer must examine these documents for authenticity and to ensure they have not expired.

Employers are required to maintain for government inspection original I-9s for all current employees. They must also retain the forms completed by former employees for three years from the employee's start date or one year after the employee's termination or resignation, whichever is later.

Form I-9 Inspections and Audits

ICE and HSI initiate the I-9 inspection process by serving a Notice of Inspection (NOI) on a business. Employers are then given at least three business days to produce the I-9s requested in the NOI, making organized record-keeping critical to ensure timely compliance. Employers who use E-Verify and those that retain copies of the documents presented must make those documents readily available to the government auditors.

At this stage of the I-9 audit, HSI will generally request specific business records from the employers including, but not limited to, payroll statements, a list of active and terminated employees, articles of incorporation, and business licenses.

Following the production of the requested I-9s, and the supporting documentation, if applicable, ICE agents will inspect the I-9s for compliance issues. Technical or procedural errors (for minor issues such as not listing a date of hire) may be corrected within ten business days to avoid fines.

On the other hand, substantive errors, such as failing to produce forms or listing unacceptable documents, cannot be fixed and are grounds for fines and penalties. Also, technical errors may become substantive errors if the employer acts in bad faith or if they fail to correct the issue within the ten day correction period.

Potential Penalties

Current civil penalties for I-9 violations (not including knowingly hiring someone who is not authorized to work) range from \$288 to \$2,861 dollars per violation, with penalties increasing for subsequent violations. For larger employers, fines for errors on I-9s can add up to millions very quickly.

In determining the penalty amount, DHS will consider the following discretionary factors: (1) an employer's size; (2) the employer's good faith; (3) the seriousness of the violation; (4) whether the individuals are unauthorized workers; and (5) the employer's history of any prior violations. Taking corrective measures like attending E-Verify webinars/trainings, and conducting self-audits have been cited as evidence of good faith efforts to comply with I-9 regulations.

Employers that engage in a "pattern or practice" of hiring or continuing to employ unauthorized foreign nationals can face significant criminal penalties. Additional civil or criminal penalties may also attach to charges of immigration fraud under 18 U.S.C. §1546. One of the most notable cases involved Asplundh Tree Expert, Co., which was required to pay a monumental \$95 million-dollar judgment for accepting identification documents it knew to be false and fraudulent.

Best Practices and Common Errors

Given the new enforcement climate, employers should revisit their Form I-9 practices and optimize their procedures and ensure full compliance. The

recommendations below have been cited as evidence of good faith compliance, and courts have considered them to be mitigating factors when determining final penalty amounts.

Conduct Periodic Form I-9 Self-Audits

An employer should conduct self-audits of its I-9s on either a semi-annual or annual basis. The percentage of total I-9s examined will largely depend upon the size of a company. For example, a company with few employees should examine most, if not all, of its I-9s during the self-audit process.

A larger employer should review a random sampling of at least 5 to 10 percent of its I-9s, being sure to select a true representative sample of I-9s by choosing I-9s prepared by different managers, maintained at different facilities, and completed at different times. If the I-9s selected are deficient, then we recommend a self-audit of all of the company's I-9s.

Use I-9 Software System

Preparing the I-9 form properly is absolutely critical – but can be tedious. Even minor errors can subject a company to fines. There are plenty of established electronic I-9 software systems that will minimize the chance of preparer error. Most of these systems will alert the preparer that there is an error as he or she completes the I-9, and will send the preparer a reminder email to reverify an I-9 if the employee's work authorization is approaching expiration.

Enroll in E-Verify

E-Verify is a web-based system, authorized by federal statute, which allows employers to electronically confirm the identity and employment eligibility of their employees. E-Verify electronically checks the documents presented in connection with an I-9 with data provided from DHS and the Social Security Administration (SSA).

The platform is voluntary in most states (including New York) and is available to all employers. The biggest

benefit of E-Verify is that it establishes a rebuttable presumption that the company has not violated immigration law with respect to the hiring of its employees.

Reverification

The I-9 regulations require the employer to reverify employees who presented work eligibility documents with an expiration date, such as an employment authorization card. ICE officers will tell anyone asking that that they collected more fines from companies failing to reverify employees than any other type of employer sanction related violation. It is critical to develop a system that allows you to timely reverify employees with expiring employment authorization documents. The I-9 software systems certainly are advantageous in that regard.

Inform and Protect Noncitizen Employees

The expansion of immigration enforcement actions, as well as the increasingly hostile rhetoric surrounding both legal and undocumented immigration, has put many on edge. In addition to establishing effective Form I-9 compliance programs, employers should instruct their noncitizen employees to retain and carry documentation establishing their lawful status and work authorization.

Lawful permanent residents should carry their original green cards with them at all times. Other non-citizens should carry their current I-94 entry records, which can be found on and printed from CBP's website. (After every trip, foreign national employees should always check their I-94s for accuracy).

They should also carry their original and current immigration approval documents (such as an I-797 approval notice, stamped I-129S, or I-20 and Employment Authorization Document), business cards or employment verification letters, confirming their title and salary, and a copy of their passport biographic page.

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