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Immigration Alert

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ICE I-9 Audits

On November 6, 1986, the enactment of the Immigration Reform and Control Act required employers to verify the identity and employment eligibility of their employees and created criminal and civil sanctions for employment-related violations. Further, the Immigration and Nationality Act ("INA") requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986. INA designates the Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification.

Employers are required by law to maintain for inspection original Forms I-9 for all current employees. In the case of former employees, retention of Forms I-9 is required for a period of at least three years from the date of hire or for one year after the employee is no longer employed, whichever is longer.

To initiate the administrative inspection process, the Department of Homeland Security's Immigration and Customs Enforcements (ICE) serves a Notice of Inspection (NOI) upon an employer compelling the production of Forms I-9. By law, employers have at least three business days to produce the Forms I-9. Often, ICE will request that the employer provide supporting documentation, which may include a copy of the payroll, a list of current employees, Articles of Incorporation, and business licenses. ICE agents or auditors then conduct an inspection of the Forms I-9 for compliance. When technical or procedural violations are found, an employer is given ten business days to make corrections. An employer may receive a monetary fine for all substantive and uncorrected technical violations.

Employers determined to have knowingly hired or continued to employ unauthorized workers will be required to cease the unlawful activity, may be fined, and in certain situations may be criminally prosecuted. Additionally, such an employer may be subject to debarment by ICE, meaning that the employer will be prevented from participating in future federal contracts and from receiving other government benefits.

Monetary penalties range from $375 to $16,000 per violation, with repeat offenders receiving penalties at the higher end. Penalties for substantive I-9 violations, which include failing to produce a Form I-9, range from $110 to $1,100 per violation. In determining penalty amounts, ICE considers five factors: the size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations.

ICE will notify the audited party, in writing, of the results of the inspection once completed. The following are the most common notices:

Notice of Inspection Results – also known as a "compliance letter," used to notify a business that they were found to be in compliance.

Notice of Suspect Documents – advises the employer that based on a review of the Forms I-9 and

documentation submitted by the employee, ICE has determined that an employee is unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing to employ that individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if they believe the finding is in error.

Notice of Discrepancies – advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine their work eligibility. The employer should provide the employee with a copy of the notice and give the employee an opportunity to present ICE with additional documentation to establish their employment eligibility.

Notice of Technical or Procedural Failures – identifies technical violations identified during the inspection and gives the employer ten business days to correct the forms. After ten business days, uncorrected technical and procedural failures will become substantive violations.

Warning Notice – issued in circumstances where substantive verification violations were identified, but circumstances do not warrant a monetary penalty and there is the expectation of future compliance by the employer.

Notice of Intent to Fine (NIF) – may be issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations. When a NIF is served, charging documents will be provided specifying the violations committed by the employer. The employer has the opportunity to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO) within 30 days of receipt of the NIF. If the employer takes no action after receiving a NIF, ICE will issue a Final Order. If a hearing is requested, OCAHO assigns the case to an Administrative Law Judge (ALJ) and sends all parties a copy of a Notice of Hearing and the government's complaint, thus setting the adjudicative process in motion.

As always, should you be contacted by ICE or another Federal Agency such as the Department of Labor related to any of the above, we strongly recommend you contact an attorney.

In addition, we strongly recommend pro-active, internal audits on a periodic basis to ensure you are compliant, so that you can avoid exposure to major fines and infractions.

This *Immigration Alert* was written by Alan J. Pollack, Of Counsel. Please feel free to contact Alan at **ajpollack@nmmlaw.com** if you have any questions regarding the information in this alert or any other related matters.