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The Rules of the Game Change As ICE Targets Employers

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The year 2009 marked a dramatic change in Immigration and Customs Enforcement's (ICE) workforce enforcement strategy. Up until 2008, ICE focused its enforcement efforts almost exclusively on illegal workers. For instance, ICE made 6,000 workforce enforcement strategy-related arrests in 2008; only 135 of them involved employers. Starting in 2009, however, ICE shifted its focus from illegal workers to employers who knowingly hired unauthorized workers. As part of its strategy of targeting employers, ICE began setting up centers around the country that are fully dedicated to I-9 audit work.

Under the Immigration Reform and Control Act of 1986 (IRCA), employers are required to verify that an employee is authorized to work in the United States by obtaining and maintaining a completed Form I-9, Employment Eligibility Verification for each employee. The Form I-9 contains a list of acceptable documents for establishing an employee's identity and authorization to work. Those documents include a U.S. Passport, Permanent Resident Card, driver's license, social security

card, and birth certificate, among others. ICE enforces employers' obligations under IRCA by, among other things, inspecting their I-9 forms.

Rather than conduct random inspections, though, ICE targets employers in industries that are critical to the nation's infrastructure, such as agriculture and food, banking and finance, commercial facilities, communications, and information technology. ICE initiates the inspection process by issuing a Notice of Inspection, which requires an employer to produce I-9 forms for all employees within three days. ICE then reviews the I-9 forms for technical or substantive violations. Substantive or technical I-9 violations result in either a warning or a fine. Between 2009 and 2012, after the change in enforcement strategy, ICE conducted over 9,000 worksite inspections and assessed approximately \$31.2 million in fines. In 2012 alone, ICE made 520 criminal arrests linked to worksite enforcement, including the detention of 240 owners, managers, supervisors, and HR employees, and served more than 3,000 Notices of Inspections.

The Department of Homeland Security's Office of Inspector General (OIG), however, recently found that ICE failed to adequately oversee its local field offices to ensure they were issuing warnings and fines consistently. In 2008, before the shift in enforcement strategies, ICE provided guidance to its field offices to help them determine whether it was appropriate to issue a warning or a fine. Under the 2008 guidance, ICE could issue a warning where, with certain exceptions, future compliance was expected, whereas a fine was to be assessed in all cases where the totality of the circumstances demonstrated that the employer had not acted in good faith.

But, according to the OIG report, at least two field offices--Miami and Los Angeles--established their own internal practices for determining when it was appropriate to issue a warning or assess a fine. In Miami, inspectors considered the character of the owners and the impact of the fine on the business' viability. In Los Angeles, inspectors issued warnings if the potential fine amount was less than \$10,000. Inspections by those field offices led to fines in only 7% of cases, far below the average in other field offices, which led the OIG to conclude ICE had not been effectively overseeing its field officer personnel.

ICE disagreed with the OIG's conclusion. According to ICE, the variance in the percentage of cases resulting in a warning or fine are not attributable to lack of oversight. Instead, ICE takes the position that local mission priorities and local socio-economic conditions are the reason for the variance in the penalty imposed for I-9 violations.

Currently, employers face significant uncertainty when it comes to I-9 compliance. Is the employer in an industry that might increase the chances of being audited? If so, is the employer located in an area where the local ICE field office uses additional criteria that may reduce the likelihood of a fine? And if not, how willing is the local field office to negotiate down any fines? These are all significant questions given ICE's increased targeting of employers as part of its worksite enforcement strategy. Remember, each and every I-9 violation can carry a penalty of \$110 to \$1,100 per form. Of course, the easiest way for employers to avoid all of this uncertainty is to make sure they are complying with their I-9 obligations—before they get audited. Ensuring that your HR team is properly trained; having a response plan in place before ICE shows up; and conducting an internal audit are all factors that can make a difference in reducing potential penalties.