

HOW TO RESPOND

When ICE Offers to Help



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hen someone approaches you in a friendly manner, you want to oblige. When someone smiles, your natural inclination is to smile back. So it's no wonder that an employer may not understand the danger posed when a friendly Immigration and Customs Enforcement ("ICE") auditor shows up at the workplace to help the employer understand its recordkeeping obligations and ensure the employer is doing its paperwork properly, even promising to do so in a timely manner so as not to disrupt the employer's business.

Unfortunately for employers, the government has been all too willing to "help" over

the last few years. As you know, employers are required to verify a person's identity and authorization to work in the United States by completing an I-9 form as part of the hiring process. Employers are required to maintain the I-9 form (and supporting documentation) for all current employees and some former ones. The statute imposing that mandate (the Immigration Reform and Control Act of 1986 ("IRCA")) and the accompanying regulations, however, are a trap for the unwary. To "help" ensure employers fulfill their I-9 requirements, ICE performs administrative worksite inspections.

A worksite inspection is triggered when ICE serves the employer with a Notice of Inspection ("NOI"). The NOI can be the result of an anonymous tip, or it can be part of an initiative by the Department of Homeland Security. The standard NOI advises the employer that it is obligated to verify the employment eligibility of persons hired after November 6, 1986 using the Form I-9 and notifies the employer that an auditor will be on-site on a particular date to inspect the employer's I-9 forms. ICE is only required to provide employers three days to produce their I-9 forms for inspection.



By Maria C. Ramos

When inspecting an employer's I-9 forms, the auditor is principally checking to see whether each employee's form has been completed properly and that the employee has produced the required documentation to verify his or her eligibility to work. An auditor generally classifies I-9 violations as either technical or substantive. Technical violations can be thought of as "paperwork" violations—i.e., failure to make sure the person has provided his or her address or birth date when completing the form. By contrast, substantive violations involve the employer failing to either verify the person's identity or authorization to work. Substantive violations can occur where the employer fails to present or where the employer fails to review and verify the documentation provided by the person (e.g., driver's license, passport, social security card, etc.). In addition to inspecting forms for technical or substantive violations, though, the auditor is also checking to see whether any of the employer's workers are unauthorized.

Ultimately, the auditor will notify the employer of the audit results, which will result in a finding of compliance, a warning being issued, or a fine being imposed. Compliance means there were no paperwork violations (technical or substantive) or unauthorized workers, or if there were technical paperwork violations, they were timely cured (typically within 10 days). The auditor issues a warning where violations were found but future compliance is expected. Fines are issued where the employer has not acted in good faith and has multiple substantive paperwork violations.

The amount of the fine varies. Fines for substantive paperwork violations can range from \$110 to \$1,100 per

violation. More significantly, fines for hiring and continuing to employ unauthorized workers range from \$375 to \$16,000 per violation, depending on whether the employer is a first-time or repeat offender (repeat offenders, of course, receive fines at the higher end of the range). When imposing a fine, ICE typically takes into account the size of the business, the employer's good-faith efforts to comply, the seriousness of the violation, whether the violation involves unauthorized workers, and whether the employer has a history of previous violations.

From 2009 to 2012, ICE conducted over 9,000 worksite inspections, which resulted in more than \$30 million in fines over that time period. In 2012 alone, ICE made 520 criminal arrests linked to worksite enforcement, including the detention of 240 owners, managers, supervisors, and HR employees. Since 2009, Congress has appropriated over \$530 million to fund a worksite enforcement strategy directed principally at employers. If that's not enough to strike fear in an employer, the employer should also be aware that the likelihood of being inspected, having a violation identified, being fined, or negotiating a fine down depends on a number of variables beyond the employer's control: the industry the employer is in, the employer's location, the ICE office conducting the audit, the ICE agent assigned to the case, and the ICE office's local rules, among other things, all come into play during the ICE audit process.

Of course, the best way to eliminate all the angst and uncertainty associated with an ICE audit is to make sure to properly complete the I-9 form in the first place. There is some truth to the old saying "an ounce of prevention is worth a pound of cure." But perfection

for human resource professionals who are wearing multiple hats on a daily basis is unrealistic. Unless your HR director is perfect, the next best alternative is to be prepared to respond to a NOI well before you ever get a knock on the door from the government.

Below is a list of tips to guide employers on how to respond to a NOI:

- **Have a process in place for dealing with the receipt of a Notice of Inspection**
Be proactive in your preparation. You could have as little as 72 hours to respond to a NOI. You don't want to wait until you receive a NOI to figure out how to respond.
- **Immediately seek counsel**
There's an old saying among lawyers: "A lawyer who represents himself has a fool for a client." That applies to in-house counsel or HR personnel who decide to handle worksite inspections on their own. You should strongly consider retaining outside counsel. And if you do retain counsel, don't wait until the eleventh hour. Allow counsel plenty of time to assist you in the audit process.
- **Carefully Read the Notice of Inspection and/ or Accompanying Subpoena**
As they say, "the devil is in the details." Only produce what is being required of you. Sometimes ICE will request I-9 forms beyond those that are required to be retained. Know what you are required to keep and produce.
- **Never Waive the 3 Day Notice to Produce the I-9 Forms**
You do not get extra credit for

turning your I-9 forms over early. Even if you believe your forms are perfect, take all 72 hours to review them and cross check them against your payroll records. If you find errors in one of your I-9 forms, you will have a chance (time permitting) to have the employee properly complete a new one, which could mitigate any fine for a technical violation.

- **Consider making corrections on the I-9 forms before producing** Take your time and conduct an internal audit with counsel's guidance before producing your I-9 forms. It may reduce your liability.
- **Extensions** Extensions, which are within the discretion of the ICE agent, are generally not granted. Assume you won't get one.
- **Contact the ICE Agent** Every ICE agent handles audits differently. Make sure that your attorney contacts the agent and knows what process the agent will follow. Have your attorney inquire about timeline, expectations, and process.
- **ICE is not your friend** Always be courteous and respectful. ICE auditors generally are too. But remember ICE agents are there to collect information. Being overly chatty often results in an employer inadvertently supplying adverse information. When in doubt, remember the old adage: "a fish with his mouth closed never gets caught."
- **Document everything that is turned over to ICE** Always keep a copy of what was produced to ICE, and request an inventory receipt from the agent.

ICE audits can take months and often are done at an ICE field office or headquarters.

Ronald Reagan once said that the ten most dangerous words in the English language are "Hi, I'm from the government, and I'm here to help." The proper size and role of government will always be subject to debate by people of different political views. But one thing shouldn't be: employers should always be wary when a government agent comes knocking on the door. No matter how good a job an employer has done with it's I-9 forms, there is always the potential for mistakes—which means a potential for fines. Make sure you have prepared well before an ICE auditor shows up at your door; otherwise, you'll be sorry you let them help.

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