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Employers: It's Perilous to Ignore ICE's Wake-up Calls

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The increasing number and severity of worksite enforcement actions by ICE's Homeland Security Investigations is a serious wake-up call for employers – but it is challenging for employers to fully comply with immigration rules for hiring and employment. Benjamin Kurten outlines the steps that employers can take to ensure they employ only those authorized to work in the U.S.

The U.S. Immigration and Customs Enforcement's Aug. 28, 2018, [press release](#) was to the point:

“As part of an ongoing criminal investigation, special agents with U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI) executed criminal search warrants at a North Texas business. HSI also arrested 160 company employees on federal immigration violations who were unlawfully working in the United States at the trailer-manufacturing business.

“This ongoing investigation began when HSI received information that the company may have knowingly hired illegal aliens, and that many of the aliens employed at Load Trail were using fraudulent identification documents.”

ICE's announcement of its apparent return to workplace raids follows other recent news from HSI: that it has substantially increased its enforcement



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activities over the past 12 months.

In particular, ICE also recently announced that, in less than six months (between Oct. 1, 2017, and May 4, 2018) HSI opened 3,510 worksite investigations, initiated 2,282 Form I-9 audits, and made 594 criminal and 610 administrative worksite-related arrests.

In comparison during the preceding 12 months, HSI opened 1,716 worksite investigations, initiated 1,360 Form I-9 audits, and made 139 criminal and 172 administrative arrests related to worksite enforcement.

Complying with the Immigration Reform and Control Act

The increased and recent enforcement activity by HSI is yet another wake-up call that employers who fail to fully comply with immigration rules in hiring and employment practices are potentially putting their business operations in serious jeopardy – and themselves at serious risk of personal criminal prosecution.

The [Immigration Reform and Control Act of 1986](#) (IRCA) imposes penalties on employers that knowingly hire or continue to employ persons who are not authorized to work in the U.S.

IRCA also requires employers to maintain documentation of their employees' authorization to work in the U.S., and penalizes employers that fail to heed their requirement. Specifically, IRCA requires employers

- to have employees hired after Nov. 6, 1986, complete Section 1 of Form I-9 no later than the first day of employment (*i.e.*, first day of paid work);
- to examine original document(s) to establish identity and work eligibility within three business days of the first day of employment; and
- to complete Section 2 of Form I-9 within three business days of the first day of employment.

Because of a fear that IRCA's pushing of the responsibility to police America's workforce onto employers would cause some employers to unfairly refuse to hire individuals who may look or sound "foreign," IRCA additionally prohibits immigration-related unfair employment practices, which may take the form of national origin discrimination or citizenship status discrimination against protected individuals.

Recommended: A Written I-9 Compliance Policy

Balancing both the obligation to verify employment authorization and the prohibition against immigration-related unfair employment practices is

complex. Keeping this balance requires sufficient preplanning and training, as oftentimes the objectives of these requirements seem to be in conflict.

Employers, therefore, should have a written IRCA Form I-9 compliance policy and manual in place. It is an important organizational tool that can reduce staff frustration by providing clear and consistent guidance in addressing IRCA's challenging requirements.

The results of recent enforcement actions have also shown that the government expects employers to have such a document in place, as it memorializes an organization's commitment to IRCA's requirements, and assists in reducing organizational violations of IRCA's requirements.

Additional Proactive Measures

In addition to implementing a comprehensive IRCA Form I-9 compliance policy, there are numerous other proactive measures that employers may take to put themselves in the best possible light in the event of a Form I-9 compliance audit by HSI.

Consider these practices to better insulate your organization against claims by employees and governmental enforcement actions under the rules and regulations of IRCA:

- Establish an organization-wide policy requiring the hiring and retention of only authorized workers.

- Establish formal "best practices" policies and guidelines regarding:
 - recruitment, hiring, and retention of only authorized workers;
 - completion, retention, administration, updating, and self-audit of Form I-9s;
 - responding to Social Security Administration (SSA) "no-match" letters and other similar correspondence from other federal or state agencies indicating there is a discrepancy between the agency's information and the information provided by either employees or the organization;
 - facilitating and responding to "tips" from employees on unauthorized workers;
 - termination of employees determined to be unauthorized;
 - preventing discrimination in the workplace based on perceived immigration status, national origin, ethnicity, etc.; and
 - assessing companywide adherence to the best practice guidelines.

- Establish a training program for managers, recruiters, human resources administrators, etc., regarding their legal obligations to prevent the knowing recruitment, hiring, and continued employment of unauthorized workers, while also ensuring compliance with pertinent anti-discrimination laws.

- Establish an internal Form I-9 completion and retention training program, with annual updates, on how to manage the completion of Form I-9, how to detect fraudulent use of documents in the Form I-9 process, and

how to maintain and update completed Form I-9s.

- Permit the Form I-9 process to be conducted only by individuals who have received the training described above.
- Provide for a secondary review as part of each employee's Form I-9 employment eligibility verification process to minimize the potential for a single individual to subvert the process.
- Arrange for annual Form I-9 audits by an external entity or a trained employee not otherwise involved in the day-to-day Form I-9 compliance activities of the company (so as to avoid self-interest in not reporting detected problems, etc.).
- Establish a reminder system for completed Form I-9s:
 - to ensure that the Form I-9s that rely on employment-authorizing documents with expiration dates are timely updated to show the continued authorized status of the workers, and
 - to prompt workers of the need to update documentation evidencing their continuing authorization to work in the U.S.
- Require written assurances and indemnification agreements from sub-contractors, independent contractors, and other outside service providers stating that they recruit, hire, and retain only authorized workers, and that properly completed Form I-9s exist for each employee of the third party providing services to your organization.

Verification Programs

In addition to the foregoing, employers may want to consider enrolling and actively participating in ICE's Mutual Agreement between Government and Employers (IMAGE) program or U.S. Citizenship and Immigration Services' (USCIS) E-Verify program.

The IMAGE Program

ICE certifies employers who follow the requirements of its **IMAGE** program as "IMAGE Certified." This designation may be considered a mitigating factor in the determination of any civil penalty amount should a penalty be levied by ICE as the result of a Form I-9 audit.

In order to participate in IMAGE, employers must:

- allow ICE to conduct an audit of the employer's existing Form I-9s,
- enroll in USCIS's [E-Verify](#) program, and
- comply with ICE's "best practices" guidelines, which include many of the suggestions noted above.

In addition, program participants must annually report to ICE the number of employees removed or denied employment as a result of program participation, as well as the discovery or allegation of criminal misconduct in the employment eligibility verification process (e.g., document fraud).

In connection with the IMAGE program, ICE will review participants' hiring and employment practices and policies, and recommend ways to correct compliance issues.

ICE represents that it will work collaboratively with employers whenever it discovers minor and isolated Form I-9 compliance errors, and keep related information confidential to the extent permitted by law and regulation. However, ICE does not promise that it will not otherwise seek to prosecute employers for Form I-9 or other related IRCA violations that it considers to be beyond minor or isolated.

The E-Verify Program

USCIS's [E-Verify](#) program provides employers with internet-based access to SSA and USCIS databases to help determine the work eligibility of employees. The E-Verify program may only be used to verify work eligibility for employees hired after enrollment, unless the employer is a qualified federal contractor.

E-Verify must not be used to prescreen employees. Instead, E-Verify screening should take place only after an employee has been hired and a Form I-9 for the employee has been completed, but no later than three business days after the employee's first day of employment. E-Verify participants must still comply with all applicable rules for Form I-9 completion, administration, and retention.

Participation in the E-Verify program is free to any employer; nonfederal contractor employers may voluntarily terminate participation at any time.

Find What Works for Your Organization

Deciding whether to participate in the IMAGE or E-Verify programs requires careful evaluation of various factors, including the risks and costs involved.

Similarly, each organization will present its own particular circumstances due to industry, location, workforce, etc., which will require the above-listed best practices and tools to be customized to best suit and support its efforts to comply with the challenging requirements of IRCA.

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