

Breaking the ICE: workplace audits are on the rise

In the last year, U.S. Immigration and Customs Enforcement (ICE) workplace enforcement actions have more than doubled since their previous fiscal year period, and arrests related to that enforcement have nearly quadrupled, according to an ICE press release. The acting executive associate director for ICE's Homeland Security investigations, Derek Benner, recently told the press that ICE plans to soon conduct up to 15,000 Form I-9 audits per year - a rate almost eight times the current one. Accordingly, Oregon businesses should be prepared for the possibility of an interaction with ICE officials.

ICE, under the jurisdiction of the Department of Homeland Security, is tasked with enforcing the immigration laws of the United States. Specifically, ICE is responsible for enforcing the 1986 Immigration Reform and Control Act, which requires employers to verify the identity and work eligibility of the individuals that they hire. This verification is documented and reported via the Employment Eligibility Verification Form I-9, with which Oregon businesses are undoubtedly familiar. ICE enforces these requirements in one of two ways: the ICE raid and the ICE audit.

In an ICE raid, agents arrive at a workplace with a search warrant signed by a judge. The warrant will contain a detailed description of what the agents are allowed to search and what they can



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seize. ICE has the ability to both levy penalties for any violations of federal immigration law that are discovered and detain any unauthorized workers that they find during the course of the raid.

In the event of an ICE raid, an employer should remain calm and cooperative. Ask to see the warrant, and gather the available documentation immediately. Contact an attorney as soon as possible, and politely refuse to answer specific, substantive questions before the attorney is present. Notably, do not answer any questions about specific employees' current employment or immigration status.

Far more likely, ICE will serve a workplace with a Notice of Inspection (NOI). It compels employers to produce Forms I-9 within at least three business days of service. The NOI may also request that the employer provide supporting documentation for the Forms I-9, such as a copy of the payroll, a list of current employees, Articles of Incorporation, and business licenses. ICE agents or auditors will then conduct an inspection of the Forms I-9 for compliance,

and may ask for corrections to missing or non-conforming paperwork in no fewer than 10 business days.

Additionally, ICE may levy fines against an employer for both substantive and technical violations, calculated via a formula that considers the total number found. These fines can range from \$220 to \$2,191 per violation, which can then be further enhanced or mitigated based on a variety of factors. If ICE finds that an employer knowingly hired and continued to employ illegal aliens, the fines range from \$548 to \$19,242 per violation, and the employer could face debarment from consideration for federal contracts.

If an employer receives a NOI, it will want to contact its attorney immediately. Time is truly of the essence because only 72 hours will be granted for an employer to gather all requested documentation and make amendments to existing paperwork consistent with ICE guidelines in order to correct any technical violations. This is especially important considering that ICE treats substantive violations and technical violations the same. Luckily, correcting

technical errors is not too difficult and can be achieved easily with the assistance of counsel.

There are a few things employers can do immediately to protect themselves and ensure they are ready for an ICE audit or raid. By assigning a point person (or persons) to take charge in the event ICE pays a visit, an employer can ensure that time is not wasted and that the procedure will progress as smoothly as possible. The employer can conduct an internal audit of its Forms I-9 to ensure compliance with applicable laws and regulations to avoid any fines. Lastly, an employer can be sure that Forms I-9 are being filled out completely and correctly upon hire.

With such a large increase in ICE enforcement actions, we encourage employers to reach out to counsel proactively to conduct internal Forms I-9 audits or to provide trainings to ensure compliance with the applicable laws and regulations, as well as to clarify any remaining questions as to best practices in the event of ICE action.

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