

Employment Alert

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ICE Storm: I-9 Audits on the Rise

By Nicole A. Flynn, Esq.

Immigration and Customs Enforcement (ICE) worksite inspections are on the rise again. The days of ICE focusing on rounding up and deporting illegal workers are gone –ICE’s focus has turned to employers. The current administration’s goals include increased audits, increased administrative fines, and increased criminal prosecutions. Consistent with these goals, ICE recently served approximately 1000 employers nationwide with Notices of I-9 Inspections.

What should you do if ICE comes knocking on your door? Receipt of a Notice of Inspection (NOI) should be taken seriously, regardless of the number of employees. If a NOI is received, employers are encouraged to:

Notify your management and executive team;

Form a centralized team to handle investigations;

Contact qualified and experienced immigration counsel;

Begin gathering I-9’s and supporting documentation.

Once a NOI is received, employers have three business days to provide the requested information. Responding employers can, where appropriate, make corrections to I-9’s, but such corrections should be made under the supervision of experienced legal counsel. During and after the audit, employers should take precautions to ensure that all anti-discrimination laws are complied with and that employees are not arbitrarily required to complete new I-9’s or provide new supporting documentation. Before turning over any information to ICE, employers should make copies of all documentation and take a detailed inventory of what is being provided to whom.

What are the consequences of I-9 violations? Recall that last fall, clothing retailer Abercrombie & Fitch was fined over one million dollars for I-9 deficiencies. This fine represented only deficiencies that arose because of the retailer’s electronic verification system – there were no instances of the intentional hiring of unauthorized aliens. More recently, Howard Industries, a privately held company, was fined \$2.5 million for actions discovered during an I-9 audit. The fines for non-compliance can be quite steep; and because they are assessed per violation, they can add up quickly. The fines for incorrect documentation range from \$110-\$1,100 per violation, while the civil fines for employing unauthorized workers range from \$375 for a first offense (per worker) to \$16,000. In

Eastman & Smith Ltd.
One SeaGate, 24th Floor
P. O. Box 10032
Toledo, Ohio 43699-0032
Telephone: 419-241-6000
Fax: 419-247-1777

Columbus Office:
100 East Broad St.,
Ste. 2100
Columbus, Ohio 43215
Telephone: 614-560-1445
Fax: 614-280-1777

Findlay Office:
510 South Main St.
Findlay, Ohio 45840
Telephone: 419-424-5847
Fax: 419-424-9860

Novi Office:
28175 Haggerty Rd.
Novi, Michigan 48377
Telephone: 248-994-7757
Fax: 248-994-7758

Website:
www.eastmansmith.com

addition to civil penalties, there is also potential for more severe consequences, such as prison terms, criminal fines, asset forfeiture and shareholder and competitor lawsuits, all of which have a significant impact on an employer's bottom line.

Because the consequences for non-compliance are so costly, it is imperative for employers to develop and enforce an immigration compliance program *before* an ICE inspection is conducted. At a minimum, compliance efforts should include implementation of an immigration compliance policy, annual audits (with an initial audit of 100% of the workforce's I-9's), and incorporation of immigration compliance attestations in vendor contracts. At the same time, employers should be careful not to commit discriminatory immigration employment practices such as discriminating based upon national origin, race, and citizenship. Adherence to these minimum requirements will provide a strong foundation for legal compliance and ultimately, a less stressful audit when ICE comes knocking.

For more information on conducting I-9 audits and what to do if you are served with a Notice of Inspection, contact your immigration counsel.

If you have any questions regarding this or any other workers' compensation or labor and employment law issue, please contact any member of the Labor and Employment Section at 419-241-6000 or visit our website at www.eastmansmith.com.



Nicole A. Flynn is a member of Eastman & Smith Ltd. Her practice consists primarily of representing employers in labor disputes and collective bargaining and before administrative agencies such as the OCRC, EEOC, NLRB and the Industrial Commission. Her experience includes work before federal and Ohio state and appellate courts.

Ms. Flynn is licensed to practice in the States of Ohio and Michigan and the U.S. District Courts for the Northern and Southern Districts of Ohio. She is a member of the Ohio State, American, Michigan and Toledo Bar Associations. She obtained her juris doctor degree from The Ohio State University College of Law, where she was a member of the Ohio State Journal on Dispute Resolution editorial board.

Nicole A. Flynn

NAFlynn@eastmansmith.com
(419) 247-1497

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