



The ICE Man Cometh

By W. Barry Nixon

If you were hoping that 2018 would be less litigious and perhaps a cooling off period for legal issues impacting background screening I want to welcome you back to reality. While FCRA class action lawsuits continue to be prevalent and don't appear to be slowing down the emerging issue which may overshadow it is immigration status issues. The Trump administration has put immigration issues front and center. As a result issues related to the I-9 form to verify right to legally work in the United States and use of the e-verify system are in the crosswinds for employers across the country.

The stage for the immigration movement was set when President Trump signed **Executive Order 13788**, entitled "Buy American and Hire American," a broad directive which calls for the rigorous enforcement and administration of existing laws to protect the interests of US workers. And sure enough, the various federal agencies followed suit with a flurry of announcements on enforcement initiatives.

Late last year, Charles Miller of Miller Law Offices, in Studio City, California foretold what was coming, "During the past few years, most of the attention has been on civil administration violations, but the worksite pendulum appears to be swinging back to more serious charges for immigration and Form I-9 violations."

Not to be left out the States have also gotten in on the act. According to the **National Conference of State Legislatures**, lawmakers in 47 states enacted 133 laws and 195 resolutions relating to immigration in the first half of 2017 (which represents a 90% increase from the prior year).

In the latter part of last year, the Immigration and Customs Enforcement (ICE) set the stage for what would be coming when they **announced that a significant increase in worksite related investigations** would happen in 2018. ICE's Acting Director Thomas Homan spoke at length about ICE's ongoing mission to promote homeland security and public safety through the criminal and civil enforcement of "existing laws on the books" which govern immigration and border control. He has clearly stated that worksite enforcement is an important (and necessary) component of ICE's overall strategy and pledged to increase the time spent by his agency on worksite audits by "four or five times."

Up to now, worksite audits have been moving along at a steady pace, but Acting Director Homan is now kicking them into high gear, and private investigators need to be prepared for helping their clients for the increasingly likely event that ICE will come knocking at the door.

Just in case you think this is political rhetoric and it will blow over consider the following:

- In October 2017, Asplundh Tree Experts, Co., one of the largest privately-held companies in the United States, headquartered in Willow Grove, Pennsylvania, (“Asplundh”), pleaded guilty to unlawfully employing aliens, in connection with a scheme in which the highest levels of Asplundh management remained willfully blind while lower level managers hired and rehired employees they knew to be ineligible to work in the United States. Asplundh agreed to pay the \$95 million dollar recovery fee, including \$80 million dollars criminal forfeiture money judgment and \$15 million dollars in civil payment. This represents the largest payment ever levied in an immigration case
- In November 2017, Cloverhill, a subsidiary of Aрызta AG, Zurich, Switzerland, a maker of baked goods for fast-food chains and supermarkets said it’s struggling to run a Chicago bakery after it lost a third of its workers in a clampdown on 800 immigrants without sufficient documentation. The company reported that the Cloverhill issue has led to a 7 percent decline in their North American sales in the three months through October. This raid is one of the biggest U.S. employment headaches reported by a European company so far.
- In January 2018, U.S. immigration agents descended on dozens of 7-Eleven stores to open employment audits and interview workers in what officials described as the largest operation against an employer under Donald Trump's presidency.

In addition to the above cited situations, according to The Migration Policy Institute the food service industry is a particularly ripe target since about 9 percent of food service workers in the U.S. are undocumented. This means if you have clients in this industry you should affirmatively let them know that I-9 preparation is critically important and the likelihood of an ICE audit should be anticipated.

What else is at risk, consider this – ICE can assess a monetary penalty for each I-9 that has one or more substantive or uncorrected technical violations using a sliding scale often known as the “matrix”. The exact fine will depend upon your overall error percentage as well as other subjective factors including the size of your business, good faith, and seriousness of the violations (to name a few). Employers with 50% or more errors will be fined at the highest amount – typically \$935 per I-9. And to make matters worse, the ICE fines have recently been **adjusted** so that you may now face a fine of up to \$2,191 for any violations occurring after November 2, 2015.

Your total costs relating to I-9 forms may be even higher, when you take into account the amount of time it takes to complete an I-9 audit and conduct overall program management

Fortunately, John Fay, Immigration attorney, Lawlogic, Inc., offered in his article, ‘ICE Announces Up to Five-Fold Increase in Form i-9 worksite Inspections’ some proven strategies that employers can initiate right away to address the risks of an ICE worksite audit.¹

“(1) Compliance Awareness

So, your first strategy (and it can be a tough one) is to emphasize the importance of the I-9 form and the process in general to your colleagues and higher-ups. Ever since the enactment of the **Immigration Reform and Control Act of 1986**, employers have (in essence) been deputized to make sure they hire a legal workforce by completing the I-9 form in a timely and correct fashion. If you (as an employer) fail in any respect, you open yourself up to very significant fines and penalties – even if you don’t have any unauthorized employees in your workforce.

(2) Conduct a Self-Audit

What’s the absolute worst thing you can do in response to an I-9 problem? Pretend it doesn’t exist. Given ICE’s renewed attention on holding employers accountable, the better practice is to uncover I-9 errors and omissions now and take remedial steps to reduce (and in some cases, eliminate) the potential penalties and fines.

While conducting an I-9 self-audit can seem like a daunting task, there are a variety of strategies and tools available to help. First and foremost, you should strongly consider working with experienced immigration counsel who can guide you in developing a remediation plan which addresses the most serious of violations first and ensures you follow all of the various rules for correcting past compliance mistakes.

At the same time, you can use a specialized electronic I-9 system which not only helps you identify all of the various errors or omissions (that may exist in your inventory of forms) but also provides a compliant (and automated) workflow for correcting those mistakes under the advice of counsel.

(3) Create an I-9 Policy Document

Experts have long recommended that employers create their own internal I-9 handbook, which specifically documents how I-9s forms will be completed and reviewed for accuracy. Having standard operating procedures not only shows good faith, it also serves as a training document – which is particularly important for large organizations where there is a possibility that a hiring manager might go rogue and “get creative” with your precious I-9 rules.

A good I-9 policy document will include the following essential details (some of which may vary from employer to employer):

- How (and when) will section 1 be completed by the new hire?
- Who is responsible for verifying identity and employment eligibility documents and completing section 2?
- Do we make/retain copies of supporting documents for all new hires, or only as required by E-Verify?
- What is the I-9 process for rehires (complete section 3 when allowable or always prepare a new I-9?)
- How do we handle remote hires?
- How do we document name changes?
- Who is responsible for managing reverifications (when required)?

As with step #2 (Conduct Self-audit) above, it’s always a good idea to work closely with your counsel in developing this document since the last thing you want to do is to systemize (and repeat) an I-9 practice which may not be compliant.”

Also the policy should include information on the following:

- **Notice Preparation**
Employers should document the specific steps that will be taken when a Notice of Inspection is received including required notifications that may be required.

In addition, HR staff should also be aware of any “post-audit” notice requirements.

- **Reverification Training**
To minimize the risk of an improper (or even missed) reverification, employers should consider the following action items:

Make sure you clearly define who should be subject to reverification

Implement a reminder system to alert you of upcoming expirations which are occurring 90 to 120 days in the future so that you can properly inform your employees and give them time to provide you with updated documentation

Decide who will be responsible for actually performing the reverification and reviewing the original documents

If you're using a **well-designed electronic I-9 system**, you can implement programmable email reminders (using the same time windows outlined above) and be assured that only eligible employees are queued up for reverification

(4) Use an Electronic I-9 System to Ensure Compliance Moving Forward

Maintaining I-9 compliance across your organization can be a moving target, particularly in light of frequently changing compliance rules and the practical realities of employee turnover.² In addition, the prospect of mandatory E-Verify may soon become a reality with the Legal Workforce Act, H.R. 3711, having been reintroduced by Rep. Lamar Smith. The bill would require all employers to use e-verify within two years.

Some additional preparatory steps that John Fay recommends in his article, **Employers Prepare Themselves for the I-9 Squeeze** include developing a detailed audit readiness process which clearly specifies the steps which should be taken when an investigator shows up at your door step.

Fausta Albi, immigration attorney for Larrabee Albi and Coker, LLP, generally advises clients to train employees at the front desk or receptionist area on how to handle audit requests." Note that audit can be a particularly stressful occasion, and staff members may understandably want to be as accommodating as possible, however, under the new California law, employers can actually be penalized for being too helpful during the audit process

Here's an example of a strategy to advise your clients not to follow.

DLS Precision Fab was fined \$305,000.00 in August 2017 for their HR Director ignoring government correspondences and stuffing I-9's in a drawer. The investigation showed more than 500 immigration law violations including Form I-9 shortcomings and knowingly employing 15 individuals ineligible to work in the U.S.

In response to their appeal of the ICE fine, the court said, Employers are responsible for supervising their employees. "The HR director was acting as DLS's agent, and his failure to perform his responsibility may properly be imputed to DLS." This scolding seems to recommend that employers refrain from putting all compliance responsibilities into the hands of one individual, with no checks.

One more issue to make sure you advise your clients not to do is to become overly zealous and to decide to simply recertify all their employees just to be sure everyone has a correct I-9 and is legally employed. Sounds like a reasonable strategy, but in reality, will not only go afoul of some state laws it could get you into trouble with federal law as well.

Federal law prohibits improper reverification of current employees with so-called "unfair documentary practices" under the antidiscrimination provisions of the Immigration and Nationality Act. As an example, California's **Senate Bill 1001**, in essence made unfair documentary practices a "fineable" offense under state law.

I have crammed a lot of information into this short article, however, now is a critical time to alert your clients to the emerging aggressiveness of ICE and that these types of investigations can result in the loss of workers, damage to company reputation and image, affect relationships with customers and the public in general. Now is the time to prepare.

Biography

1. Fay, John, 'ICE Announces up to Five-Fold Increase in Form I-9 Worksite Inspections,' <https://www.lawlogix.com/ice-announces-up-to-five-fold-increase-in-form-i-9-worksite-inspections/>
2. ditto
3. Fay, John, 'Employers Prepare Themselves for the I-9 Squeeze,' <https://www.lawlogix.com/employers-prepare-themselves-for-the-i-9-squeeze/>

About the Author



W. Barry Nixon is the COO, PreemploymentDirectory.com the leading background screening information portal and online worldwide directory of professional background screening firms and Suppliers to the background screening industry. He co-authored the landmark book, Background Screening & Investigations: Managing Hiring Risk from the HR and Security Perspective. He also is the publisher of award winning newsletters, *The Background Buzz* and *The Global Background Screener*, and the author of the Background Checks column in PI Magazine.

In addition, Barry is a past recipient of the elite 'Top 25 Influential People in Security' by Security Magazine and past Co-Chair, International Committee for the National Association for Professional Background Screeners (NAPBS). He currently serves as a Global Ambassador for NAPBS.

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