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Preparing for and surviving the new ICE Age

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Under the Trump administration, U.S. Immigration and Customs Enforcement (ICE) significantly increased its worksite enforcement actions against employers during 2018. From October 2017 through mid-July 2018, ICE opened 6,093 worksite investigations and made 675 criminal and 984 administrative worksite-related arrests.[1] Behind these numbers is the belief that immigration compliance will protect US workers and jobs. According to Derek N. Benner, executive associate director for Homeland Security Investigations, "worksite enforcement protects jobs for U.S. citizens and others who are lawfully employed, eliminates unfair competitive advantages for companies that hire an illegal workforce, and strengthens public safety and national security."[2]

ICE's worksite enforcement strategy focuses on the criminal prosecution of employers who knowingly break the law, and civil fines to encourage compliance with the law. The Form I-9 is the primary enforcement tool of ICE. Federal law requires employers to inspect every employee's evidence of ability to work in the United States and to document that information using the Employment Eligibility Verification Form I-9. All industries, regardless of size, location, and type, are expected to comply with the law. ICE has the authority to inspect employer records to determine whether the employer is in compliance. When employers do not fulfill their immigration compliance obligations, ICE can fine an employer several thousands of dollars for each violation.

I-9 Notice of Inspection

Although ICE might demand to see Form I-9s as part of an immigration inspection, employers should remember that they have rights too. To initiate an investigation, ICE must supply a subpoena in the form of a Notice of Inspection (NOI). At minimum, the employer will have three business days to provide ICE with Form I-9s and related documentation. Although employers have the option of waiving the three-day notice period, it is never advisable to do so. And, depending on the circumstances, it may be possible to extend the three-day period to ensure that the response is properly prepared. Therefore, upon receipt of an NOI, employers should immediately contact an experienced immigration attorney.

At the conclusion of the audit, ICE can issue to the employer a Notice of Intent to Fine, assessing civil penalties for errors on the Form I-9s ranging from $220 to $2,191 per violation. For knowingly hiring and continuing to employ unauthorized workers, ICE also can assess civil penalties ranging from $584 to $4,384 per unauthorized worker for the first offense; $4,384 to $10,957 for second violations; and $6,575 to $21,916 for subsequent violations. In determining penalty amounts, ICE considers five factors: size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations.