Cold as ICE: Employers Face Stiff Fines for Immigration Document Violations

Unless you have been living under a rock for the past year, it is well-known that the Trump Administration ("Administration") has an agenda to crack-down on illegal immigration. Part of this process includes extensive audits on businesses conducted by U.S. Immigration and Customs Enforcement ("ICE"). Although immigration management is an important part of our Nation's regulatory and security processes, audits on businesses are often conducted with very little notice and result in hefty fines from ICE.

It is anticipated that ICE audits will become even more prevalent with the Trump Administration. Employers can avoid some of the burden and risk of fines by being cognizant of, and prepared for, ICE audits. At the very least, employers must keep their immigration records organized, accurate, and complete to provide support for substantially mitigating any fine.

THE PROCESS

The Immigration Reform and Control Act ("Act) requires employers to verify the identity and employment eligibility of their employees, commonly known as the I-9 form/process. The Act is governed by 8 C.F.R. 274A and codified in the Immigration and Nationality Act 8 U.S.C. 1324a.

Prior to an ICE audit, your company will receive a Notice of Inspection ("NOI") that compels your company to produce I-9 forms and supporting documentation for all employees that fall under the scope of the Act. Employers will be given three days from the NOI to prepare for ICE officers to arrive and perform the inspection.

Once the inspection is complete, if there are any violations, ICE may choose to issue a Notice of Intent to Fine ("NIF"). The NIF will explain the applicable violations and fines incurred.

After receiving the NIF, your company has 30 days to submit a hearing request in writing to ICE in an effort to dispute or mitigate the fine. Also, you may submit a written response to ICE addressing each allegation within 30 days of the NIF. However, if your company does nothing after receiving the NIF, ICE will issue a ***final and unappealable*** order enforcing the fine.

WHAT TO DO IF YOU RECEIVE A NOTICE OF INSPECTION FROM ICE

Immediately after receiving NOI from ICE, you should contact counsel (or other specialist) familiar with the I-9 auditing process to help you prepare for the audit. Retaining assistance at this stage will allow for ***proactive review*** and guidance prior to ICE's inspection. This will allow you to cure any defects in your company's records prior to inspection and/or obtain an extension of time to prepare, if necessary.

Many folks cringe at the thought of needing counsel or avoid it in an effort to avoid incurring costs. However, in this circumstance, retaining assistance to prepare for an ICE audit may prevent a six to seven figure fine from being assessed against your company. Indeed, even if your company is not employing any unauthorized aliens, your company can still be fined significantly for "paper work" violations, which at first glance, appear to be minor in nature and degree. Such violations are significant to ICE and can rack-up significant fines per technical violation.

HOW CAN I DISPUTE OR MITIGATE A FINE AFTER RECEIVING A NOTICE OF INTENT TO FINE FROM ICE

If the proactive approach has come and gone, your company still has the ability to dispute and/or mitigate an ICE fine for I-9 violations. If the alleged violations are technical or procedural, these can be cured within ten days post-inspection. Technical or procedural violations would be minor details missing from the I-9 form that do not affect ICE's ability to determine whether the employee is authorized to work in the U.S. However, if the violations are not cured, they will be deemed substantive and fined.

Substantive violations are failures in the I-9 form completion process that prevent ICE from confirming that the employee is authorized to work in the U.S. Examples include failure of the employee to sign Section 1; failure of the employer to sign Section 2; missing List A or List B and C information; and failure to produce an I-9 form for an employee covered by the Act. Such violations are difficult to overcome, but worth combating.

Disputing substantive violations requires a thorough review of all information and records that were subject to the ICE audit. In practice, we often find instances where ICE issued fines for employee violations where defenses are applicable such as a statute of limitations defense (8 C.F.R. 274a.2(b)(2)(i) or 28 U.S.C. 2462); Substantial Compliance defense; Good Faith defense under 8 C.F.R. 274a.4. (applicable to "knowing violations"); Eight Amendment defense for excessive fines; or ICE simply erred in its review of the often voluminous records and fine calculation. Asserting these defenses, when applicable, may result in significant reduction or elimination of the fine against your company.

CONCLUSION

The best way for an employer to protect itself from ICE fines for I-9 violations is to implement effective standard practices for executing the I-9 form with new hires (and re-hires), organizing record keeping in accordance with the Act, and training. Further, retaining assistance after receiving NOI, but before the inspection actually occurs, will allow you to cure defects prior to the audit and avoid fines altogether. When all else fails, you should notify and retain counsel immediately upon receiving notice that your inspection was unsatisfactory to begin the mitigation process.

For any questions, concerns, or training on the I-9 process, please do not hesitate to contact me at (248) 351-7008 or jmackenzie@maddinhauser.com.