# ICE ANNOUNCES I-9 AUDIT INITIATIVE IN CONNECTION WITH STRATEGY TO CURB ILLEGAL EMPLOYMENT

ICE issues Notices of Inspection to 652 businesses nationwide.

DHS, Senate act on E-Verify and No-Match Rules.

In April, the Department of Homeland Security's Immigration and Customs Enforcement (ICE) agency implemented a new, comprehensive strategy the agency claims is designed to reduce the demand for illegal employment and to protect employment opportunities for the nation's lawful workforce. Under this strategy, ICE is focusing its resources on the auditing and investigation of employers who knowingly employ illegal workers. Employer and immigration advocacy groups have complained that this new policy puts employers at risk because, while employers must shoulder the burden of employment verification compliance, they are also prohibited from engaging in any conduct that could be deemed discriminatory on the basis of national origin or immigration status.

Nonetheless, in a move no doubt calculated to highlight ICE's new enforcement strategy, on July 1, 2009, ICE launched an I-9 audit initiative by issuing Notices of Inspection (NOI) to 652 businesses nationwide. The NOIs alert business owners that ICE will be inspecting their records to determine whether these employers are complying with employment eligibility verification laws and regulations. According to the ICE Press Release, "[t]he 652 businesses being presented with a NOI . . . for a Form I-9 audit have been selected for inspection as a result of leads and information obtained through other investigative means."

Investigative leads can come from a variety of sources, but commonly include complaints from disgruntled employees, employer filings of applications to legalize the status of undocumented workers while continuing to employ them illegally, and consumer complaints that one's identity is being used by an employee.

Under the Immigration Reform and Control Act of 1986 (IRCA), employers are required to complete and retain a Form I-9 for each individual they hire for employment in the United States. The I-9 requires employers to verify the identity and employment eligibility of each newly-hired employee. Employers must review and record the individual's identity and employment authorization documents and ensure the documents reasonably appear genuine and to relate to the individual presenting them.

The NOIs will provide three (3) days for the employer to submit their I-9s for inspection. It is not likely that extensions will be granted, so employers who receive a NOI should act promptly and diligently. Retention of an experienced employment and/or immigration counsel is recommended due to the potential for monetary penalties and other sanctions.

# DHS ANNOUNCES E-VERIFY PROGRAM TO BECOME PERMANENT FOR FEDERAL CONTRACTORS AND RESCISSION OF SOCIAL SECURITY "NO-MATCH"

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On July 8, the DHS announced it was moving forward with full implementation of the Bush Administration rule that in order to be awarded a government contract, a company must use the E-Verify program to verify the employment authorization of its employees. Under this final rule, E-Verify will be required of all federal contractors, regardless of size, holding a contract with a period of performance longer than 120 days and a value above $10,000. Subcontractors who provide services or construction with a value of more than $3,000 will also be required to use E-Verify. The E-Verify requirement will apply to federal contractors and subcontractors that receive American Recovery Reinvestment Act funds as well.

At the same time, however, DHS announced it will rescind the controversial "No-Match" regulation it initially proposed in 2007. That regulation was blocked by court order shortly after it was proposed and as a result has never formally been implemented. In announcing its decision to drop this so-called "safe harbor" regulation, DHS reasoned that "E-Verify addresses data inaccuracies that can result in no-match letters in a more timely manner and provides a more robust tool for identifying unauthorized individuals and combating illegal employment."

Meanwhile, the U.S. Senate has also joined the debate and taken up the issues of E-Verify and the No-Match rule. Amendments were approved on July 8, as part of the 2010 Homeland Security appropriations bill, that would make the voluntary E-Verify program permanent and, consistent with the DHS announcement, would mandate its use by federal contractors. Another amendment was approved on July 9, however, that would prohibit using funds from the bill to rescind the No-Match rule. If ultimately passed, this measure could effectively block DHS' rescission of the proposed rule. Some Senators complained that abandoning the No-Match rule is inconsistent with and a step backward from the new DHS enforcement policy, and insisted that American employers are entitled to this regulatory guidance on how to properly handle the receipt of a no-match letter.

An amendment was also introduced that would allow employers to use E-Verify for all its employees, not just for new hires. There is some uncertainty, however, whether this amendment will be retained, as it may be deemed appropriate for an appropriations bill.

We will continue to monitor these issues and keep clients apprised of developments as they occur.