

STAYING AHEAD OF THE GAME ON STATE AND FEDERAL IMMIGRATION ENFORCEMENT INITIATIVES

Does Your Business Have an Effective Immigration Compliance Program?

Over the past year, employers have been dealing with immigration enforcement initiatives at the federal, state and local levels. In some instances, businesses have been targeted for audits by Immigration and Customs Enforcement (ICE) with very tight time periods to produce I-9 documents. Also, some South Carolina businesses with more than 100 employees have recently been the subject of random audits by the South Carolina Department of Labor, Licensing & Regulation (SCLLR) and have been asked to produce I-9 documents and present employees to be interviewed by immigration officials. In order to successfully maneuver the current enforcement maze, businesses must have good documentation, trained personnel and a solid immigration compliance plan. This article will summarize some of the recent audit initiatives by ICE and SCLLR and offer suggestions for creating an effective immigration compliance program.

ICE Enforcement Initiatives

In recent months, Janet Napolitano, Secretary of the Department of Homeland Security (DHS), has clearly communicated the Obama Administration's emphasis on increased worksite enforcement. On July 1, 2009, DHS launched a nationwide targeted audit initiative of approximately 650 businesses. ICE provided businesses with a three (3) day notice period and required employers to produce I-9 documents for current and terminated employees pursuant to the DHS retention rules. Many businesses are still awaiting results from these audits which could include closure of the audit file, or a variety of follow up measures. Follow up measures could include a request for additional documents, interviews, subpoenas, notification to the business that some employees are not legally authorized to work in the United States and/or notification that the company will be monetarily fined and/or subject to criminal indictment. Aside from these targeted audits, other businesses have been selected for random audits and have been asked to provide similar documents in a relatively short period of time. These audit initiatives are likely to continue in the coming months as DHS moves forward with its objective of "cracking down" on employers in this era of immigration enforcement.

LLR Activities

In early July, the South Carolina Department of Labor, Licensing and Regulation (SCLLR) began conducting random audits of South Carolina businesses with more than 100 employees pursuant to the South Carolina Illegal Immigration Reform Act. Investigators appeared at worksites without providing advance notice and asked for I-9 documentation for employees hired before and after July 1, 2009. In some instances, SCLLR auditors asked to interview employees as well. The South Carolina Chamber of Commerce along with legal and business representatives raised concerns about SCLLR's random audit process and met with SCLLR to address these concerns. At this point, we are awaiting SCLLR's response to these issues. The issues include, but are not limited to, providing a three (3) day notice period prior to the audit; requesting documentation only for employees hired after July 1, 2009 (the effective date for private employer compliance under the Act), and understanding the criteria for interviewing

employees. We anticipate clarification on these issues in the near future. In the meantime, however, SCLLR continues to audit South Carolina businesses with more than 100 employees.

Critical Steps For Immigration Compliance and Risk Avoidance

In light of these enforcement initiatives at the federal and state levels, it is imperative for businesses to be well-prepared before an auditor comes knocking at the company door. Businesses can take several proactive steps in order to minimize liability in the wake of immigration enforcement initiatives.

Comprehensive Compliance Policy

A good immigration compliance policy will address the company's commitment toward immigration compliance as well as nondiscrimination in the workplace. The policy often sets forth the individuals responsible for immigration compliance and addresses important issues such as recordkeeping, verification (i.e. E-Verify) and audit procedures. It also establishes a timeline for monitoring immigration compliance activities. The policy should present the internal and external contacts should the company experience an immigration audit and/or ICE raid. It can also outline the company's process and procedure for handling Social Security mismatch issues, visa and green card sponsorships and knowledge gained by a manager or agent about a potential unauthorized worker. The policy should be periodically reviewed and updated on an as needed basis.

Training

Businesses should have one or two professionals thoroughly trained and staying abreast of immigration compliance issues at all times. These individuals can be responsible for I-9 administration of new hires and for making corrections to I-9 forms during the self-audit process. Some companies choose to have large numbers of employees involved in the I-9 process but this often leads to inconsistencies and errors particularly when there has been a lack of proper training on "knowledge" issues and proper I-9 completion. Trained individuals can often be a valuable liaison with the company's legal counsel during the course of a federal or state immigration audit.

Audits

Conducting an annual I-9 self audit is an excellent tool for minimizing potential liability in an audit. This process entails thoroughly reviewing I-9 documents for current and terminated employees. If the employer finds missing information or incomplete information on the I-9 forms, a designated person should be assigned to correct the I-9 forms. It is important to never backdate or white out information on the I-9 forms and to follow a consistent, uniform approach in making corrections. A detailed audit memo should be prepared summarizing the company's audit results.

Conclusion

Employers should not be intimidated by the recent enforcement activities of federal, state and/or local immigration officials. Good compliance training, periodic self-audits and a solid compliance plan will result in a prepared business when the auditors come knocking.

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