

## CHALLENGES & DEVELOPMENTS IN IMMIGRATION COMPLIANCE

In recent months, several measures by the Department of Homeland Security (DHS) and its enforcement arm, Immigration & Customs Enforcement (ICE) resulted in increasing pressure on employers to comply with immigration related laws.

Immigration issues are often complex, even for the savvy Human Resources professional. Due to political pressures and other forces, immigration compliance has become increasingly difficult, as the risks of non-compliance grow ever-greater.

Three areas where all employers must consistently pay attention and establish functional compliance programs are: 1) I-9 compliance, including use of the newly issued I-9 form and Employer Handbook; 2) Social Security Mismatch notice protocol; and 3) responding to an ICE visit or raid.

### I. I-9 Compliance

In November, 2007, DHS issued a new I-9 form as well as a new *Handbook for Employers: Instructions for Completing the Form I-9*. The form is available at [www.uscis.gov](http://www.uscis.gov) or by calling (800) 870-3676. The Handbook and new I-9 form are also available through our website at [www.michaelbest.com](http://www.michaelbest.com).

As of December 26, 2007, all employers must utilize the new I-9 form, which includes several changes. The new I-9 Form and instructions contain a revised set of List A documents, which are those that evidence both an individual's identity and employment eligibility. The revised I-9 Form removes five (5) documents from List A that were listed on the earlier version of the form, and adds one (1) new document, the Employment Authorization Document (Form I-766), provided the document is not expired.

Employers should carefully examine the new forms, as well as the newly published set of instructions, which the employer is expected to make available to employees when they are completing the I-9 form.

NOTE: I-9 forms must be completed for all employees, including U.S. citizens and permanent residents. I-9 compliance is not limited to foreign employees.

Significantly, under the Immigration Reform & Control Act, an employer must accept original documents that "reasonably appear genuine on their face." As was the case before, employers may not specify which documents to produce. Similarly, the employer may not require more documentation than is required by the I-9 form. The employer must accept documents that appear on the lists in the I-9 form.

If an employer has information that indicates that an employee's work authorization is limited (for example, an employee with an EAD listing an expiration date), the employer must follow-up and re-verify the employee's eligibility when his or her document expires. Employers should keep careful records of expiration dates and dates for re-verification. With the issuance of the new I-9 form and manual, now is the time to conduct an internal, confidential audit of I-9 compliance. Periodic review of the I-9 procedure is the best way to ensure full understanding of the legal requirements and to ensure compliance. Employers should take advantage of the issuance of a new I-9 form and Employer Handbooks to train employees that are in charge of assuring completion of I-9s.

It also notable that with the issuance of the new I-9 form, DHS has changed its enforcement policy regarding I-9 compliance. Whereas the agency previously did not seek criminal sanctions for some violations, ICE intends to seek full sanctions against any employer found not in compliance with the new I-9 requirements. This provides yet another reason why it is important that staff be well trained and knowledgeable in this area.

## II. Social Security Mismatch Situations

For years, employers have received "mismatch letters" from the Social Security Administration, and few knew what, if anything, to do in response to such letters. In July, 2007, the DHS finally issued long-awaited regulations describing a "safe harbor" for employers who receive such letters. The rules protect the employer from immigration fines and penalties, even if the employee subject to the safe harbor procedure is actually an unauthorized alien. Second, the rules provide a limited defense from government claims of discrimination based upon the employers' conduct in following the process.

These new rules have been placed on hold due to litigation. The DHS has decided to try to issue new rules by spring of 2008. In the meantime, we believe that if you receive a mismatch letter you should check your records to make sure you are using the correct number. If your records appear correct, you should send a note to the employee and inform them of the fact you have received a mismatch letter and ask them to contact the Social Security Administration to address the issue. In the note you should ask the employee to give you any new information they obtain from the Social Security Administration. Please document each step you have taken to follow up on the Social Security mismatch letter.

## III. ICE Raids

According to ICE, "No employer, regardless of industry or location, is immune from complying with the nation's laws. ICE and our law enforcement partners will continue to bring all our authorities to bear in their fight, using criminal charges, asset seizures, administrative arrests and deportations." Julie L. Myers, Assistant Secretary for Homeland Security, Immigration & Customs Enforcement.

ICEs recent slew of raid activity and criminal indictments are clear indicators that employers are primary targets in the government's efforts to stop illegal immigration. Employers who are found to be "egregious" violators of immigration laws are now facing criminal racketeering charges under RICO, potential jail time, employee lawsuits for back pay, and personal fines and criminal charges against individual owners and managers.

These highly publicized raids and actions are based in large part on ongoing criminal investigations by ICE. Some investigations begin with warrants, others with I-9 compliance audits.

Significantly, a showing of good faith can go a long way in helping employers avoid potential fines and penalties, which can range from \$200-2,200 per unauthorized worker for first offense to \$2,200-\$5,500 for second offense, and \$3,300-\$11,000 for third offense, and additional civil penalties.

Several components of an I-9 protocol can be used to establish good faith, including:

- The proper and timely completion of Form I-9 for all employees hired after November 6, 1986;

- Zero tolerance for individuals who fail to provide proper documentation required by the I-9;
- A tickler system for re-verification;
- Documented I-9 training for company representatives who are part of recruitment, orientation and hiring processes; and
- Regularly conducted internal I-9 audits.

If, despite all this, ICE arrives (which it may unexpectedly), employers should have an action plan. ICE investigations often involve an announced visit at which the ICE officer delivers a letter asking to review I-9s and payroll information within three business days, and it is to the employer's benefit to have a system in place in the event of this contingency.

At a minimum, employers should have:

1. An authorized designated representative who knows the procedures and how to contact the company's attorneys. All employees should be fully trained to direct inquiries to this person.
2. A policy of retaining I-9 documents separate from personnel and other records.
3. A system for informing all members of management of the arrival of ICE.

It is possible that ICE will arrive at the employer's operation with a warrant that will give the ICE officers access to the employer's facilities. The law allows employers to insist that ICE present a warrant prior to entry. Whether or not to do so, however, is a very critical issue that should be examined on a case-by-case basis. Employers should consult with their individual counsel to determine whether insisting upon a warrant or whether questioning the validity of the warrant is in the employer's best interest in the event of an unannounced entry by ICE officers on to employer's premises.

As with all government inspections, the more one knows, the better prepared one is to deal with the threat. During this time of increasing vigilance on the part of inspectors, employers are wise to further educate their managers and executives on various aspects of immigration compliance. Quality training programs are available regularly on these subjects through our Firm.

### In Summary

1. Make sure I-9s are properly completed and stored.
2. Conduct training for employees in charge of I-9 preparation.
3. Conduct periodic audit of I-9s.
4. Do not just throw away your social results mismatch letters or on the other hand do not overact (there is no need to fire employees listed on mismatch letters). Follow up on the letter and document the steps taken.
5. Have a plan in place in case you receive a visit from immigration authorities.