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H-1B Site Visits and Form I-9 Audits: What You Should Know About These Latest Enforcement Trends

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In order to reduce and discourage visa fraud and unlawful employment, U.S. Citizenship and Immigration Services (USCIS) has begun a two-prong enforcement campaign aimed at employers by heavily utilizing H-1B site visits and Form I-9 audits. As a result, USCIS has deployed inspectors to perform thousands of on-site inspections of petitioning employers who have sponsored H-1B specialty occupation visa employees. This program is funded through the mandatory $500 "Anti-Fraud" fee that employers pay when sponsoring such individuals. In addition, I-9 audits are increasing in frequency and resulting in serious criminal and civil penalties to noncompliant employers. Both efforts are changing the culture of worksite enforcement and no industry is exempt from scrutiny.

These inspections are representative of the Obama administration's efforts to move away from Bush-era immigration raids and to refocus instead on employers who knowingly flout the law. For example, USCIS has been randomly conducting site visits of H-1B employees, with more slated to take place in 28 cities nationwide. Moreover, Immigration and Customs Enforcement (ICE) is doing its part to discourage unlawful employment of undocumented aliens. In June 2009, ICE served 650 I-9 audit notices in a single week — a practice that has continued since.

H-1B site visits are conducted without advance notice and are focused on identifying fraudulently filed H-1B petitions. Inspectors are seeking verification that the sponsoring company is a bona fide operating business entity and that the foreign worker is employed in the capacity for which s/he was sponsored. In addition, inspectors have been charged with looking for specific types of fraud, including false documentation and false claims of employment. To date, reports of visits recount that inspectors want to meet and interview the H-1B worker, confirm the employee's identity, meet with human resources personnel to confirm details of the H-1B employee's employment, and inspect payroll records.

To ensure that an H-1B site visit proceeds smoothly, the following measures should be carefully considered.

1. Each company should designate a contact person for communication with USCIS/ICE in the event of a site visit.

2. All foreign nonimmigrant employees, including H-1B status holders, should be encouraged to maintain copies of their passport ID pages, Notices of Action, and Form I-94 in their desks to prove identity in the event of being requested by a U.S. government official.

3. H-1B employers should maintain a public access file containing a copy of the certified Labor Condition Attestation, proof of the prevailing wage determination, copies of the employer's compensation system, or pay scale used to determine actual wages being paid to the employee.

4. Employers should maintain materials used to satisfy employee/union notification requirements, a summary of benefits offered to U.S. workers in the same occupational classification as H-1B employees, and any other documents for special situations.

5. Documentation connected to the H-1B application should be retained for one year beyond the last date on which any H-1B employee was employed.

6. Human resource or other personnel should be ready to confirm the employee's date of hire, job title, work location and salary.

If a company is selected for a

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site visit, with or without advance notification from the USCIS, it is strongly recommended that they seek professional legal counsel to guide them through the process.

With regard to Form I-9 audits, the best way for the employer to prepare is to be closely familiar with the form itself and its proper protocol.

Under the provisions of the Immigration Reform and Control Act of 1986 (IRCA) all employers are required to have on file Form I-9, Employment Eligibility Verification, for each newly hired employee, both citizen and non-citizen alike. This law has been in effect since November 1986 and requires the employer to verify the employment eligibility of a newly hired individual within three business days of the employee's first day of work. The employer does this by reviewing and recording the individual's identity and employment eligibility document(s) and determining whether the document(s) reasonably appear(s) to be genuine and to relate to the individual.

Failure to complete and retain Form I-9 can result in significant civil and criminal penalties. Since the spring of last year, more than 1,600 businesses nationwide have been suspected of cultivating illegal workplaces by knowingly employing illegal workers and served with Notices of Inspection (NOIs) by ICE. These notices alert business owners that ICE will be inspecting their hiring records to ascertain whether or not they are complying with employment eligibility verification laws and regulations. As recently as March, an additional 180 businesses in Louisiana, Mississippi, Alabama, Arkansas and Tennessee have been served with NOIs.

In the event of an audit, employers will have three days to present their I-9s for inspection. The I-9s will be examined for missing and/or incorrect information and penalties will be assessed accordingly. The penalties can range anywhere from $110 for each paperwork violation to $16,000 for each unauthorized worker employed.

On its face the I-9 form seems deceptively simple to fill out correctly, and without understanding its importance in proper context, many busy employees, HR reps and employers give it only a cursory glance before filing it away. However, as perhaps proof of this one-page form's relative difficulty, USCIS has published a nearly 60-page booklet called the M-274: Handbook for Employers. The booklet is available online through the USCIS website and is highly recommended reading for all employers and their representatives administering the forms.

Any company notified of an impending audit should immediately contact experienced immigration counsel in order to bring about swift and favorable resolution.

In the absence of comprehensive immigration reform, these types of site visits and audits are simply two tools with which the federal government can enforce employment and immigration laws. Instead of focusing on the unauthorized employee alone, shifting responsibility to employers for their hiring practices is just one way to share accountability and ensure that all U.S. employees have the proper work authorization. An ounce of prevention by the employer is worth a pound of cure.■