

EMPLOYERS BEWARE!! WORKSITE INVESTIGATIONS CONTINUE

The word on the street is that the Immigration and Customs Enforcement (ICE) agency is forging ahead with many worksite investigations. By now, all employers are well aware of the fact that under the present administration, there has been a shift in immigration enforcement from the arresting of workers to the fining or imprisoning of employers.

In fact, ICE has been issuing federal government subpoenas and Notices of Inspection (NOI) to businesses nation-wide. These sweeps began with an April 2010 ICE announcement that it is proceeding with its comprehensive strategy to reduce the demand for illegal employment and protect employment opportunities for the nation's lawful workforce. Under this strategy, ICE is continuing to focus its resources on the auditing and investigation of employers who are suspected of cultivating illegal workplaces by knowingly hiring and employing undocumented workers.

For every employer, it is increasingly important to be aware of the dire nature of ICE's worksite inspections in order to be prepared for an audit. A recent audit of retail giant Abercrombie & Fitch resulted in a settlement of a fine of nearly \$1.05 million dollars. Accordingly, U.S. businesses should seek guidance from their immigration counsel and establish compliance policies which will enable them to weather the potentially cloudy storm when ICE comes knocking at the door. Best practices should include that as an employer, you:

- **Read and refer to the Handbook for Employers (M-274).** The handbook provides a "411" on I-9 completion and is published by USCIS. This one page form can be surprisingly confusing.
- **Provide I-9 training for your staff.** Include all human resource personnel as well as other employees who are in the field.
- **Store I-9 forms safely and be able to retrieve them within three business days, should they be requested.** It is best to keep your I-9 forms in one place –separate from other personnel files and employer records so sensitive information will not be unnecessarily revealed during an audit.
- **Review and understand the retention requirements.** Essentially, for current employees, the I-9 must be retained throughout the life span of the employment. For terminated employees, the I-9 must be retained as follows: three years from hire or one year from discharge, whichever is later. We suggest the

creation of an excel spreadsheet to keep track of the hire date, the termination date, and the retention date. Once the retention date has passed, the I-9 may be purged.

- **To photocopy or not? Set company policy regarding the photocopying of Section 2 documents.** Decide what is best for your business. But remember, you must be consistent.
- **Perform internal audits regularly.** An internal audit is the best way to detect and correct errors and ensure that I-9s have been completed properly for your workforce. It can also demonstrate a "good faith effort" to remain compliant which could spare you serious penalties in the event of a government audit.
- **Avoid employment practices that are considered discriminatory.** Employees must be treated equally regardless of their citizenship or immigration status, national origin or native language. Many well-intentioned actions can be considered discriminatory; for example, employers are not allowed to ask to see work authorization documents before hiring on the ground that someone seems "foreign" or is not an American citizen.
- **Establish a "tickler" system.** Alert yourself to fast approaching deadlines for I-9 completion as well as approaching work authorization expiration dates.
- **Appoint a compliance officer.** Task one individual with the ultimate responsibility for I-9 completion and the authority to speak with ICE, should the need arise.
- **Contact competent counsel.** When in doubt, ask an expert. Before your business is issued a subpoena or NOI, consult with an immigration attorney.

The time to act is **NOW**. Be proactive, not reactive.

About the Author



Michael J. Wildes is managing partner of Wildes & Weinberg P.C., America's preeminent immigration law firm serving international and domestic corporate and individual clients with their U.S. immigration needs. The firm has offices in New York City and Englewood, N.J. It has a department dedicated to Form I-9 audits, training and discrimination avoidance. Mr. Wildes is a former Federal Prosecutor and recently completed two terms as the Mayor of Englewood, NJ where he resides. Feel free to email him at michael@wildeslaw.com or call at (212) 753 -3468 if he can be of any assistance to you or someone you know.