

Immigration Employment

a news and commentary blog by attorney Charles Miller, Miller Law Offices, Studio City, California. www.millerlawoffices.com

Wednesday, July 22, 2009

CCH White Paper: DHS's refocused worksite enforcement strategy targets employers

This new CCH White Paper provides employers with compliance advice concerning the latest DHS immigration employment enforcement efforts. It features tips regarding the use of the revised I-9 form by attorney Charles M. Miller. Miller is one of three authors of a forthcoming Aspen Publishers title scheduled for release in August 2009. Immigration Law in the Workplace, a comprehensive, authoritative yet easy-to-read topical approach to current worksite enforcement and compliance issues.

We provide the CCH White Paper in our Publications section in Adobe .pdf format.

Posted by Charles Miller at 1:24 PM 

Wednesday, July 8, 2009

Napolitano: No-Match Rule to be Rescinded

By Charles M. Miller

Homeland Security Secretary Jane Napolitano announced on July 8, 2009, that it was the agency's intention to withdraw the Social Security No-Match Regulation, which has never been implemented and has been blocked by court order, in favor of the E-Verify system. http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm .

The AFL-CIO, ACLU, National Immigration Law Center, US Chamber of Commerce, and other plaintiffs, were successful in obtaining a preliminary injunction in October 2007 stopping DHS from implementing this regulation. (*AFL-CIO v Chertoff*, ND Cal, No 3:07-cv-04472-CRB). In November 2008, DHS had filed a motion asking Judge Charles Breyer of the Northern District of California to lift the preliminary injunction on the federal agency's much beleaguered no-match regulation after publication of the agency's No -Match supplemental final rule had been published in the Federal Register. Found online at <http://edocket.access.gpo.gov/2008/pdf/E8-25544.pdf>.

District Court Judge Breyer delayed the hearing on the merits of the litigation until the Obama administration had the opportunity to develop its own position, as reflected in the Napolitano press release. Judge Breyer had indicated that SSA had been prepared to send 140,000 letters concerning 8 million employees for Tax Year (TY) 2007. However, SSA No-Match letters for recent tax years have been in a holding pattern because of the litigation, with no current

announcement as to the plans for their resumption.

Employers are reminded that the no-match letters represent only one form of constructive knowledge; ICE Worksite Enforcement cases may be based on other forms of constructive knowledge. As a practical matter, an employer may obtain constructive knowledge that unauthorized aliens may be employed by a variety of other circumstances, including: (1) where the employer fails to complete or improperly completes the Form I-9; (2) from information obtained from a labor certification application or visa petition; (3) rejection of an alien worker as an applicant due to employment authorization and/or identity document deficiencies, who later appears as an employee of an independent contractor; (4) local law enforcement advice after criminal and civil processes involving off-worksite activities of such a worker, and (5) adverse publicity following a contractor's worksite enforcement problems at another company.

Posted by Charles Miller at [10:53 AM](#) 

Thursday, July 2, 2009

Alert: Immigration Audit Policy Change

by Charles M. Miller

On July 1, 2009, U.S. Immigration and Customs Enforcement (ICE) announced a policy change issuing Notices of Inspection (NOI) to 652 employers nationwide to initiate administrative I-9 audits. This policy announcement marks a shift in enforcement emphasis from the Bush administration's policy of emphasizing criminal investigations of employers suspected of violating the federal immigration employment laws by the use of criminal search warrants based on probable cause, which do not require advance notice.

John Morton, the Department of Homeland Security Assistant Secretary for ICE, announced that the 652 businesses were selected for audit as a result of leads and information obtained through other investigative means.

Employers have had the responsibility of verifying the employment authorization and identity documents of all persons hired since the enactment of the Immigration and Reform and Control Act (IRCA). This legislation makes it unlawful for U.S. employers to hire undocumented workers. Under the Act's provisions, employers are required to verify the identity and work eligibility of all employees, including U.S. citizens, on Form I-9. Employers have the obligation to refuse to employ a person whose authorization and/or identity documents are unacceptable.

IRCA mandates that an ICE administrative Form I-9 audit be preceded by the written Notice of Inspection (NOI), providing for the IRCA-mandated 72-hour notice. The NOI will indicate the date, time and place that the ICE agent will arrive, and the documentation that the employer is requested to produce.

It is wise for an employer to comply with an ICE NOI. If the employer does not comply with the request to present the Form I-9, ICE may compel production by issuing a subpoena. A refusal or delay in the production of the Form I-9 will be considered a violation of the retention

requirements by the government. ICE may also assert general powers to obtain personnel records that pertain to the hiring and employment of an individual employee. In the absence of the employer's willingness to produce the personnel records, ICE may issue an administrative subpoena to obtain these materials. Some employers have refused to comply with the administrative subpoena necessitating the agency to enforce the subpoena in federal court. Nevertheless, employers may need to rely on the negotiating skills of their attorneys to reasonably limit the scope of the ICE audit.

The employer's compliance program should include a response plan for government contacts, including information for support staff such as receptionists and human resources staff members since these will likely be the first persons that the agents talk to. There should be a line of managerial response, so that support staff is aware of which company personnel should be called, and in what order. A company should be sure that legal counsel, whether in-house or external, is immediately notified as to the nature and details of the government contact at issue, as well. Since ICE may ask consent to do a "survey" of the employees present at the employer's work place, it is advisable to have counsel present when agency investigators are on the company's premises. Note that, in the absence of consent by the employer to a survey, ICE may not make a warrantless search of the company's premises.

ICE audits focus on whether employers have violated the prohibitions against knowingly employing unauthorized aliens and Form I-9 paperwork violations. While there is a good faith defense allowing employers ten days after agency notice to effect good faith I-9 paperwork corrections, DHS has not implemented the defense by either regulation or policy, and will need to be a subject of negotiation with ICE auditors. It is also important to note that there is also a statutory affirmative defense to the "knowingly hiring" charge when the employer is able to prove good faith compliance with the I-9 verification requirements.

After the audit a Notice of Intent to Fine (NIF) may result. When a NIF is issued, employers may request a hearing within 30 days of its service before an Administrative Law Judge of the Office of the Chief Administrative Hearing Officer (OCAHO), under the authority of the Executive Office for Immigration Review, within the Justice Department. Hearing requests must be in writing and filed with the ICE office designated in the NIF. If a hearing is not requested within the 30- day period, the ICE will issue a final order to cease and desist and to pay a civil money penalty. If a hearing is requested, ICE will file a complaint with OCAHO to begin the administrative hearing process which may end in settlement, dismissal, or a Final Order for civil money penalties. Employers who have faced administrative charges in the past have subsequently found their companies the focus of criminal investigations, years after the imposition of administrative civil sanctions.

While a company's actual compliance procedures will vary depending on its size and specific industry hiring practices, these compliance suggestions are offered to employers:

1. Follow a specific hiring policy that incorporates not only the verification and record keeping provisions, but also the antidiscrimination provisions.
2. Do not request specific identity or employment authorization documents from a new

employee.

3. If Forms I-9 have omissions; take immediate steps to complete the Forms I-9 now with accurate and conspicuous, albeit tardy, dates of completion.
4. Provide on-going training and resource materials for company personnel involved in the verification and record-keeping process.
5. Keep a tickler system for the reverification of employees with employment authorizations that expire.
6. Verify the documents of employees hired for three days or less should be verified prior to their first day of work to insure compliance.
7. Human resources personnel should contact legal counsel prior to an immigration-related hiring or firing.
8. Do not begin the verification process until a prospect has accepted the offer of employment.
9. Conduct regular internal Form I-9 audits at your hiring offices.
10. Use legal counsel to draft prohibitions, auditing compliance safeguards and indemnification provisions against the use of unauthorized labor when negotiating or renewing contracts involving independent contractors or subcontractors. Ensure that they comply with all federal and state labor, wage and hour laws.
11. Train your employees and managers for permissible use of independent and subcontractors. Teach them to report the suspected use of unauthorized labor by the company's contractors.
12. Conduct contractor due diligence. Check the contractor's company history and public records to obtain an accurate assessment of the company's legal compliance track record.
13. Promulgate a policy prohibiting the use of any labor contractors who employ undocumented workers, subject to disciplinary action up to and including discharge.

Posted by Charles Miller at [12:44 PM](#) 

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About Me

Charles Miller

Charles M. Miller helped to establish immigration law as a field of legal specialization. He is currently chair of the Compliance Standards Task Force established by the American Immigration Lawyers Association to create model U.S. standards for the best practices and ethics for worksite enforcement compliance auditing under the Department of Homeland Security regulations and related employment laws. The Studio City, California law practice he shares with his wife and partner Terri Senesac Miller, has achieved preeminent national recognition, unique for a boutique immigration law firm. www.millerlawoffices.com Charles Miller authors Immigration Law in the Workplace (Aspen Publishers) with co-authors Marcine Seid and Christopher Stowe, which provides guidance to U.S. companies concerning their immigration obligations and benefits for foreign employees.

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