

## Is Your I-9 Audit Notice in the Mail?

by Charles M. Miller<sup>1</sup>

On January 20, 2011, ICE Director John Morton focused on I-9 employment verification efforts by Fortune 500 companies by announcing that Tyson Foods, Inc. had joined the IMAGE program, a DHS voluntary immigration compliance program. The ICE Mutual Agreement between Government and Employers (IMAGE) is a DHS program which encourages employers to voluntarily adhere to best hiring practices and to submit to an annual I-9 audit by external auditors or independent internal auditing. Tyson, with almost 100,000 employees, is the nation's largest IMAGE member.

Director Morton also announced the creation of a new employment compliance center in Crystal City, VA. The center will be staffed by 15 auditors who will help regional field offices conduct Form I-9 audits of targeted businesses. The mission of the center is to facilitate audits of national companies with large numbers of employees. It is clear that ICE Notices of Inspection, providing companies with 72 hours' notice requiring the production of their I-9 and related employment forms for their workforce, are forthcoming to the nation's largest employers.

The objective of the ICE audit, a statutory administrative inspection, is a determination whether the employer has violated the prohibitions against knowing hiring or continuing employment of unauthorized aliens and Form I-9 paperwork violations. An ICE administrative Form I-9 inspection must be preceded by a 72-hour notice. This is accomplished when a Notice of Inspection is served indicating the date, time and place for the ICE audit, and the documentation that the employer is requested to produce.

The ICE GUIDE TO ADMINISTRATIVE FORM I-9 INSPECTIONS AND CIVIL MONETARY PENALTIES (2008) described the importance of I-9 inspections to the ICE worksite enforcement strategy:

In some instances, the administrative inspection process will be an integral part of the overall criminal investigation while in other instances this process may be the sole investigation of the employer. In both cases, the administrative inspection and fines process is a critical component of ICE's overall national strategy aimed at reducing employment as a motivating factor for illegal immigration and to garner employer's voluntary compliance with the nation's immigration laws.

The Obama Administration has clearly preferred using administrative I-9 inspections with resulting civil fines<sup>2</sup> over the workplace raids that generated controversy in previous years, using

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<sup>2</sup> The potential civil fines for offenses occurring after March 27, 2008, range from \$375 to \$3,200 for each unauthorized employee; \$3,200 to \$6,500 per employee for the second violation, and \$4,300 to \$16,000 for the third or additional offense. 8 C.F.R. § 274a.10(b)(1)(ii)(A) to (C). Potential paperwork violation fines range from \$110 to \$1,110 per violation. 8 C.F.R. § 274a.10(b)(2). See Inflation Adjustment for Civil Monetary Penalties under Sections 274A, 274B, and 274C of the Immigration and Nationality Act, 73 Fed. Reg. 10130 (Feb. 26, 2008) (*hereinafter* Inflation Adjustment for Civil Monetary Penalties).

criminal search warrants based on probable cause, which do not require advance notice to suspected violators. Nevertheless, it is clear that employers may still face criminal charges for violations that are uncovered during the administrative I-9 audits, which are conducted by ICE special agents and forensic auditors. An inspection of the Forms I-9 may be conducted either on the employer's premises or at an agency office, at the agency's discretion. Employers may provide the forms in their original form or on microfilm or microfiche at the location where the request for production was made.

If the Forms I-9 are kept at another location, the employer should notify the inspectors of that location and make arrangements for the inspection to be conducted there. If the employer does not comply with the request to present the Forms I-9, ICE may compel production by issuing a subpoena. A refusal or delay in the production of the Forms I-9 will be considered a violation of the retention requirements by the government. ICE asserts its general powers to obtain personnel records that pertain to the hiring and employment of an individual employee, and typically issues 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.<sup>3</sup> In the absence of consent by the employer to a survey, ICE may not make a warrantless search of the company's premises.<sup>4</sup>

The Notice of Inspection (NOI) may be accompanied by a request that the employer provide supporting documentation, which may include copies of attached documents presented at time of I-9 completion for all current employees, and all terminated employees for the specified audit period and employee rosters or payroll reports listing all persons employed during the specified period. In the alternative, the NOI may be served along with an administrative subpoena.

A recent administrative subpoena required presentation of the following documents:

- Original I-9 Forms and any copies of attached documents presented at time of I-9 completion for all current employees, and all terminated employees for the specified audit period;
- Employee roster or payroll report listing all persons employed for the specified audit period, containing the following information:
  - Full employee name (First Name, Middle Initial, Last Name)
  - Social Security number
  - Date of birth
  - Date of hire and date of termination (if applicable). If the employee has multiple dates of hire, provide all dates of hire and all dates of termination occurring during the audit period;
- Monthly payroll reports for the specified audit period with wage detail by employee;
- Copies of recent state unemployment insurance quarterly tax reports;
- Copies of the Quarterly Tax Statements (IRS Form 941) pertaining to all employees during the audit period;
- Independent contractor roster listing the dates of hire and termination (if applicable)

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<sup>3</sup> *INS v. Subpoena of Ramirez*, 905 F.2d 97 (5th Cir. 1990).

<sup>4</sup> *Marshall v. Barlows, Inc.*, 436 U.S. 307 (1978).

and copies of IRS Tax Form 1099 filed during the audit period, for all independent contractors;

- A current listing of all paid on-call individuals employed on a sporadic, irregular, or intermittent basis and not deemed to be employees;
- Copies of Social Security Administration Employer Correction Requests received during the audit period;
- Copies of any Citizenship and Immigration Services (CIS) I-129 or I-140 petitions and Department of Labor (DOL) ETA-9089 certifications submitted or received during the audit period;
- Copies of articles of incorporation, business license(s) and the most recent annual report;
- Employer Identification Number (EIC) and Taxpayer Identification Number (TIN) documentation, and
- If available, copies of company procedures or policies regarding Form I-9 preparation.

The ICE GUIDE TO WORKPLACE ENFORCEMENT (March 26, 2008), provides a list of agency procedural steps during the I-9 Audit:

“ICE Special Agents and Forensic Auditors should follow these steps when conducting an inspection of Forms I-9:

1. Make copies of all presented original Forms I-9 and attachments (for review and marking, if errors are present)
  - Secure original Forms I-9 presented for inspection.
2. Check for Substantive Failures
  - Failure to prepare or present Forms I-9;
  - Ensure presentation of a Form I-9 for each employee;
    - Conduct comparison of payroll records, (IRS statements and SSA letters) to the Forms I-9 presented;
    - Determine whether to conduct paperwork inspection of all Forms I-9 or a sampling based on the total number of forms presented and the availability of resources;
    - Check for substantive paperwork errors.
3. Check for Technical or Procedural Failures.
4. Check for Authenticity of Presented Documents
  - Conduct DHS indices checks for all DHS documentation presented for hire;
  - Cross-check DHS indices results against SSA No-Match letter information, if secured;
  - Generate a Suspect Document list and prepare letter for employer.
5. Determine further investigative actions, to include the development of a criminal case and/or administrative sanctions
  - Serve Notice of Suspect Documents letter, or other appropriate notice, to the employer;
  - Plan for an enforcement operation.”

The current ICE procedure is to notify the employer, in writing, of the results of the completed inspection, typically using one of the following notices:

- **Notice of Inspection Results** - also known as a "compliance letter," used to notify an employer found to be in compliance.
- **Notice of Suspect Documents** – An ICE determination advising the employer that, based on a review of the audited documentation, certain employees are unauthorized to work, when fraudulent documents are identified, and advising the employer of the possible criminal and civil penalties for continuing to employ these individuals. ICE provides the employer and employee an opportunity to dispute its findings and to present additional documentation to demonstrate work authorization if they believe the finding is in error.
- **Notice of Discrepancies** – This notice informs the employer that, based on a review of the I-9 documentation submitted by the employee, ICE has been unable to make a work eligibility determination. The employer should provide the employee with a copy of the notice, and give the employee an opportunity to produce additional documentation to establish his or her employment eligibility.

The ICE GUIDE TO ADMINISTRATIVE FORM I-9 INSPECTIONS AND CIVIL MONETARY PENALTIES (2008) indicates the additional enforcement measures that may follow from the Notice of Discrepancy:

“a. These letters are issued when the Form I-9 inspection process reveals indicators of identity theft being committed by the employee. The purpose of this letter is to displace unauthorized aliens who have assumed the identities of U. S. citizens in order to evade the employment eligibility verification requirements of 8 U.S.C. § 1324a(b) when the local OI field office is unable, based on case specific factors, to encounter, verify the work eligibility, and criminally or administratively arrest, as appropriate, these individuals.  
b. This letter advised the employer the ICE Special Agents will make themselves available at the employer’s business location to conduct interviews with the employees identified as having discrepancies. In the alternative, those employees may submit additional documentation to ICE to verify their identity and work eligibility.”

- **Notice of Technical or Procedural Failures** – The IIRAIRA good faith paperwork violation defense requires ICE to identify I-9 technical paperwork violations, providing the employer 10 business days to correct the forms.

After 10 business days, uncorrected technical and procedural failures may be the basis of a **Notice of Intent to Fine (NIF)**. The NIF contains alleged violations and a proposed fine amount. Employers may request a conference with DHS attorneys and agents before or after the NIF is served on the employer.

In order to avoid a final order, the employer must respond to the NIF by requesting a hearing before an administrative law judge, actually serving the request on the DHS office designated in the DHS NIF within thirty days of its service. If service is effected by ordinary mail an additional five days is added to the permitted response period.

### **What the Company Can Do Before the Audit Notice Comes**

One of the most effective compliance techniques is to conduct an internal evaluation of the existing immigration compliance program. The advantages to doing this are that once a company's program is effectively evaluated, its strengths and weaknesses will be revealed. It is also recommended that this technique be used in advance of the company's decision to join the E-Verify or IMAGE programs.

A company's compliance evaluation should include an internal Form I-9 audit in addition to an assessment of the existing compliance program. An internal I-9 audit, however, will not replace the need for a private external audit conducted by trained attorney auditors according to generally accepted legal principles. Companies with high media profiles, including companies with federal contracts, an extensive history of no-match letters, past enforcement actions, and outsourced jobs to contractors, are well advised to engage a private external audit before the audit notice arrives in the mail.

External immigration compliance auditing is the preferred method to preemptively assess and remediate deficiencies in the corporate immigration compliance program. By the time a Notice of Inspection is served the issues will usually revolve around the 72 hour disclosure requirements rather than represent an opportunity for curing errors and mitigating civil or criminal liability.