

## **ICE Audits of I-9 Records**

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The U.S. Immigration and Customs Enforcement (ICE) recently launched an initiative to audit certain employers' I-9 records through the issuance of Notices of Inspection.

In the Bush years, ICE was more likely to perform raids of employers suspected of hiring and employing illegal aliens or those persons without proper employment authorization documents. Under the new administration, Secretary of Homeland Security Janet Napolitano has moved away from such raids; instead, she has authorized ICE audits of employers' I-9 records.

So what is the difference between an ICE raid and an ICE audit? As it sounds, a raid involves numerous ICE agents surrounding an employer's facility, storming the facility, detaining all employees suspected of unauthorized work status and placing them in detention (prison). It utilizes an enormous amount of manpower and resources of the government.

An ICE audit involves ICE agents hand-delivering a Notice of Inspection to an employer and demanding to inspect that employer's ICE records, though an employer has three days to comply unless it is already using E-Verify. In reality, the ICE agents are willing to provide more than three days notice, if requested.

During the period between the delivery of the Notice of Inspection and the deadline to provide the I-9s, the employer has the opportunity to review its I-9 files to make any necessary paperwork corrections or determine if all of the employees' I-9s are in order.

Then, ICE agents return to the employer's facility and remove the I-9s. (Employers should always make copies of the I-9s before providing ICE with the original I-9s.) At this point, the I-9s are taken to the ICE offices where their agents audit the records. Specifically, ICE reviews each I-9 and supporting documentation to determine whether an employee's alien number (usually referred to as an A number) matches the government databases.

After the audit is complete, which may take anywhere from one month to 18 months, ICE returns the I-9s and provides a Notice of Suspect Documents. This notice lists the names of all employees whose I-9s could not be authenticated.

At this point, the employer must give notice, in writing or verbal, to each affected employee and provide them with an opportunity to correct any mistakes or provide proper work authorization documents. If an affected employee does so, the employer must provide such documents to ICE for their review. If an affected employee does not provide any such documentation, an employer should terminate the employee. Failure to do so means the employer could face fines of between \$275 and \$2200 per violation for knowingly employing unauthorized workers. Additionally, if there is a pattern or practice of hiring or continuing to hire illegal aliens, the employer may be subject to criminal charges.

Moreover, if an employer terminates the affected employees after providing notice and an opportunity to provide new documentation, an employer will not be subject to any fines or penalties for knowingly employing unauthorized workers unless ICE discovers other evidence that the employer was previously aware of the affected employee's illegal status and took no action. The fact that an employer hired an illegal alien, who provided a false A number, permanent resident card, work authorization document or Social Security number, is insufficient to prove the employer knowingly hired any illegal aliens.

ICE may still issue a "Notice of Intent to Fine" for paperwork violations. However, these fines are substantially lower than the fines for "knowingly employing" illegal aliens and do not carry any possible criminal violations.

In the last year, the most high profile ICE audit occurred at American Apparel in Los Angeles, where the employer terminated over 1,800 employees after ICE determined their work authorization documents were not proper. During the ICE audit, American Apparel fully cooperated and has not received any fines or penalties for employing 1,800 illegal aliens.