CARLTON FIELDS

Employers: Are You at Risk for Immigration and I-9 Audits?

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The Background

The Obama administration has attempted to attract and retain new and highly skilled talent to the United States, setting initiatives to allow foreign nationals working in the United States to remain here. Yet it has also extended the administrative site visit and verification program (ASVVP) to L-1 visas, the temporary work visa used for intercompany transferees. The ASVVP is designed to complement the U.S. Department of Homeland Security's existing anti-fraud visits. So, on the one hand, the United States recognizes the opportunities presented by globalization. But on the other hand, it continues to make it more difficult to hire employees from abroad by expanding site visits to include employers with L-1 transferees, in addition to continuing to conduct site visits on those that bring in or hire professionals with H-1B visas (another temporary work visa classification). The U.S. Immigration and Enforcement (ICE) workforce enforcement strategy rolled out in April 2009, had collected far more than $12 million in administrative fines and debarred approximately 375 employers for administrative and criminal violations by the end of 2012. Homeland Security Investigations and ICE have targeted all industries and companies of all sizes for investigations of fraud, site visits, I-9 audits or audits of other employment-related practices that come to light as a result of other U.S. government agency visits or investigations. The majority of I-9 audits or unfair immigration-related employment practice claims stem from anonymous tips from disgruntled or terminated employees; or tips or referrals from other U.S. government agencies. In the past three months, the Department of Justice (DOJ) has reached several agreements with companies for unlawful employment eligibility verification practices based on such tips. **Government Targets All Industries**

In one case, the DOJ reached an agreement with a Dallas concrete company requiring the company to pay $115,000 in civil penalties because it subjected non-U.S. citizen new hires to unlawful demands for specific documentation issued by the Department of Homeland Security (DHS) to verify their employment eligibility, and selectively used E-Verify to confirm employment eligibility of individuals the company knew or believed to be non-U.S. citizens or foreign-born. Additionally, the company was subjected to monitoring of its employment eligibility verification (I-9) practices for one year. In a similar case, a Denver-based janitorial company reached an agreement with the DOJ to pay $75,000 in civil penalties following claims that it allowed U.S. citizens to present their choice of

documents when completing the I-9, but subjected non-U.S. citizen new hires to unlawful demands for specific documentation to verify their employment eligibility. In this case, the investigation was also initiated based on a referral from the USCIS, and the employer was also subjected to ICE monitoring of its I-9 practices for one year. In yet another case, a Seattle food company was fined $40,500 and subjected to monitoring of its I-9 practices for one year based on the same unfair practices toward non-U.S. citizens. In a Texas-based case, the same findings were due to a referral from the USCIS. There, a supermarket chain required lawful permanent residents to produce new employment eligibility documents when their green cards expired, even though the I-9 and E-Verify rules do not mandate that practice. The supermarket chain had to pay $43,000.00 in civil penalties and was subjected to monitoring of its employment eligibility verification practices for 18 months. **E-Verify Use Affords No Presumption of Compliance**

The U.S. government can find employers who use E-Verify liable for I-9 violations and impose civil penalties. Employers who sign up to use E-Verify also sign a memorandum of understanding that provides that they are not exempt from the responsibility of completing, retaining, and making available for inspection forms I-9 that relate to their employees. In a March 2014 case, the Office of the Chief Administrative Hearing Officer (OCAHO), one of three adjudicative components within the Executive Office for Immigration Review, found an Arizona golf club liable for 129 I-9 violations and that its use of the E-Verify program provided no blanket protection from I-9 rule compliance. The OCAHO has jurisdiction over three types of civil penalty cases arising under the immigration laws, including employer sanctions, unfair immigration-related employment practices and immigration-related document fraud. ICE sought $136,697 in total civil penalties from the golf club for improperly completing certain sections of the Form I-9 or failing to present certain employees' I-9s when requested by ICE. **What Should Employers Do?**

These actions should alert employers to take all necessary internal steps to prepare for any audits or investigations. Easy and cost-effective preparatory actions can prevent or minimize heavy civil penalties. Both legal and human resource departments can take the necessary steps to help ensure that the findings and penalties noted above are not imposed on their company. They should review internal immigration practices and I-9 completion and maintenance policies; conduct internal I-9 audits periodically; and conduct training sessions in I-9 completion and preparation for investigations and audits.

Related Practices

Immigration Planning and Compliance
Labor & Employment
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