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The Importance of an I-9 Form

Article By
Jennifer G. Parser
David L. Woodard
Poyner Spruill LLP

- Immigration
- Labor & Employment
- Administrative & Regulatory

- All Federal

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Immigration and Customs Enforcement Sanctions Followed by SEC Probe

ICE's Increasing Audit Activity

The publicly traded Chipotle Mexican Grill restaurant chain (Chipotle) is a recent high profile example of an Immigration and Customs Enforcement (ICE) audit with an unusual conclusion: a Securities and Exchange Commission (SEC) probe. Since 2009, ICE has conducted over 7,500 audits and imposed over $80 million in fines. In 2011 alone, ICE conducted 2,740 audits and assessed over $7 million in fines.

The I-9 Form

The I-9 Form is deceptively simple and should be a key part of an employer's hiring process for any new employee. Failure to take the I-9 process seriously, or the use of an external I-9 vendor whose I-9 compliance and storage program is flawed, can be seriously disruptive of a business, unleashing exponentially larger problems, including SEC follow-up for publicly traded companies as was the case of Chipotle.

ICE Investigates Chipotle and SEC Follows Up

In 2010, ICE investigated Chipotle's hiring practices in Minnesota by auditing its I-9

Forms and hiring practices. Following that audit, Chipotle terminated approximately 450 workers whose documentation proving identity and employment authorization were problematic. In 2011, ICE proceeded to audit Chipotle's I-9s and hiring practices in other states, including Washington, D.C. Chipotle's hiring practices in D.C. were referred by ICE to the US Attorney's Criminal Division. Subsequently the SEC subpoenaed Chipotle's headquarters requiring that it provide information regarding employees' work authorization, related public statements and information. That investigation was ongoing at the release of this article.

Connection between ICE Audit and SEC Investigation

Why has the SEC followed up on an ICE audit? Chipotle is a publicly traded company within the purview of the SEC. But this type of sequential activity most likely gained momentum because of joint investigations by ICE, the Department of Homeland Security, and the US Attorney's office. While the SEC has a mandate to ensure that publicly traded companies adequately disclose risk to their investors, there are no express disclosure requirements under securities laws relating to immigration and employment. However, the requirement that a company adequately discloses risks would seem to include immigration and employment because of the potentially punishing repercussions associated with an ICE audit of and sanctions against the company. Legal fees, shareholders' suits and bad public relations can further erode a company's fiscal health and standing – associated exposure.

Examples of ICE Sanctions

Aside from the disruption of operations and attendant expenses as well as the negative publicity, the fines or even a settlement resulting from an ICE audit can be extremely onerous. Recently, a Texas vegetation management company paid $2 million in settlement as part of a criminal non-prosecution agreement. A second recent example provides the potentially devastating results in terms of fines and imprisonment when there is a total failure to complete I-9s for workers that were transported and/or harbored as part of a conspiracy to hire illegal workers. If convicted, the field operations supervisor of the company in question faces a maximum aggregate sentence of 100 years in prison, a fine of $5 million, a supervised release term of 60 years, and a special assessment of $2,000. The company itself faces a total maximum fine of $10 million, a probation term of five years on each count, and a special assessment totaling $8,000.

Pro-Active Measures

ICE stresses that the integrity of employment records are of the same importance as those of tax records. Lack of or defective I-9s are a "smoking gun" for ICE to decide whether to prosecute an employer. Meticulous I-9 completion and policies with annual self-audits are the best protection in the event of an ICE audit.

In an effort to decrease paper and ensure streamlined record-keeping, many employers are turning to external vendors that provide electronic I-9 programs, frequently choosing a comprehensive software package that includes electronic I-9 and even E-Verify as part of other payroll and benefit functions. However, the company can be found liable by ICE for any I-9 violations or flaws in an external

vendor's I-9 program, even when the deficiencies are due to the program itself. Likewise, an employer can also become the target of a Department of Justice suit for an overreaching I-9 process in its vendor's software that results in employment discrimination.

Conclusion

The deceptively simple I-9's completion should be taken as seriously as any other federal filing. Given the short notice ICE may or may not provide before an audit or raid and the potentially draconian consequences for I-9 errors or omissions, an annual legal audit is a prudent measure to be fully prepared for ICE. Publicly traded companies are now audited more easily by ICE due to its relatively new Employer Compliance Inspection Center in Virginia for larger employers' audits. Further, the SEC has demonstrated that it may follow up to protect shareholders because of the materiality of any illegal hiring practices. While bundled HR software that includes I-9 compliance may seem attractive, the vendor must be selected carefully by the company, with a diligent analysis, preferably by experienced immigration counsel, of the program's legality and vendor obligations.

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