

Immigration and Employee Documentation

DON'T LET I-9 AUDITS PUT YOU ON THIN ICE.

Lately, there has been a lot of increased chatter about a potential surge in U.S. Immigration and Customs Enforcement (ICE) raids at employers' places of business. These raids are part of an effort to root out employees who have lied on Form I-9s and to catch employers who have not properly checked identification documents or have failed to complete I-9s. However, drastically increasing I-9 audits for purposes of engaging in a mass deportation scheme is a Herculean task. With the President attempting to slash the budget to other federal departments while simultaneously increasing defense spending and trying to fund the construction of a border wall, in reality, a large increase in raids may be somewhat cost-prohibitive. Nevertheless, we are likely to see an uptick in the number of I-9 audits that ICE conducts, and there are some reports of these raids occurring already.

According to a 2015 Pew Research Center study, more than one-third of undocumented immigrants in Oregon's labor force work in the service industry. Due to the large volume of undocumented workers employed in the hospitality industry, there has certainly been some concern that restaurant and lodging businesses may be one of the focuses of such an increase in ICE enforcement and raids. With the hefty fines (and even potential prison time) that can accompany instances of knowingly employing undocumented workers, hospitality industry employers should not underestimate the risk of an audit. So what is an employer in the hospitality industry to do?

HAVE AN ICE PLAN

Having a plan if your business finds itself in the crosshairs of an ICE investigation is crucial. ICE has the power to subpoena documents from an employer—namely, the Form I-9s and related documentation—to see if there are irregularities in the paperwork that the employer is legally required to collect. The time for an

employer to respond to such a subpoena is usually very short, so being prepared to respond timely is vital. If your business is subjected to an ICE audit, the agents will most likely show up unannounced, as no advance warning is required. Remember, if ICE agents do arrive at your business, they will need to have a warrant to enter the business. However, agents are allowed to enter places of your business that are generally open and accessible to the public without a warrant. While it can be intimidating for a team of ICE agents to show up on site, the fact that they are government agents does not give them a free pass to inspect the premises or speak to employees absent a warrant. Furthermore, while employers should not impede any investigation or be combative with the agents, employers do have the right to remain silent, speak to their attorney, and should call counsel immediately if faced with an audit. It is also a good idea to have people, such as management personnel, who are trained for ICE visits. These employees would be responsible for speaking with the agents directly, and keeping the agents from wandering around the business into areas outside the scope of the warrant. Furthermore, other employees would know exactly who to notify in the event your business is visited by ICE agents. If you have multiple offices or facilities, consider having at least one point person per facility that is given this responsibility.

PERFORM AN INTERNAL AUDIT

In preparation for a visit from ICE, employers may consider conducting an internal I-9 audit to make sure that the business has all its records complete. Hopefully, you've done everything by the book and your I-9s exhibit no anomalies. If there are issues with your I-9s, however, you should act with care in remedying them. An employer who only selectively audits I-9s of certain employees could give rise to allegations of discrimination. It is important to note that employers cannot continue to employ a worker that the employer knows

to be undocumented (and is therefore not legally eligible to work in the United States).

BE CAREFUL NOT TO DISCRIMINATE!

As the hysteria grips employers and word of the first ICE audits begins to trickle out, employers should remember that discrimination stemming from actions taken in regard to citizenship can land the employer in hot water with the Department of Justice under the Immigration and Nationality Act. One key thing to remember is that employees should only be re-verified in certain circumstances. If you undertake an internal audit to shore up the company's I-9 records and find that a few people submitted suspect information which the employer initially accepted as valid (or worse yet, did not even bother to view the required documentation), re-verifying these employees could subject the employer to liability. Additionally, employers are prohibited from requesting additional or different documentation than otherwise required to verify eligibility for employment. Employers also cannot reject seemingly authentic documents. Employers are not tasked with being experts at sniffing out identification fraud, but should know what the required documents look like and be able to spot obvious fakes. This, of course, is not to say that conducting an internal audit is a bad idea or should not be done. On the contrary, such practice can be a good thing, particularly when faced with a potential ICE audit. However, employers should enlist the help of an HR professional or employment law attorney to make sure that your workplace follows best practices and avoids discrimination claims in the process. | SEAN RAY, BARRAN LIEBMAN LLP

ABOUT

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