

Immigration Compliance Alert

ICE Increases I-9 Audit Actions

In July 2009, U.S. Immigration and Customs Enforcement (ICE) notified 652 businesses that they had been targeted for in-person inspections of their I-9 Employment Eligibility Verification Forms. This recent enforcement initiative is part of the government's efforts to hold employers accountable for their hiring practices and ensure a legal workforce across the country. John Morton, Assistant Secretary for ICE, has stated, "ICE is committed to establishing a meaningful inspection program to promote compliance with the law." He added that the nationwide effort was a first step in ICE's long-term strategy to address and deter illegal employment by focusing on employers rather than on undocumented workers. In all of fiscal year 2008, ICE issued only 503 similar notices to employers.

In light of ICE's increased enforcement, employers should focus more resources and attention on the I-9 Form as an important compliance obligation. I-9 Forms should be completed for all employees hired after November 6, 1986. Employers should perform internal audits to ensure that all I-9 Forms are fully completed and signed by the employee and employer representative. Employers must retain I-9 Forms during the period of employment and until the later of three years after the date of hire or one year after the date that employment is terminated. The failure to properly complete and retain I-9s may subject the employer to criminal and civil money penalties. Employers should not only ensure that they do not hire or continue to employ workers they know to be ineligible for employment, but should also ensure full compliance with all regulatory requirements and establish internal "best practices" to avoid liability.

USCIS Fraud Unit Site Visits: What H-1B Employers Need to Know

In recent months U.S. Citizenship and Immigration Services (USCIS) has begun making unannounced site visits to workplaces and administrative offices of companies employing

foreign nationals in H-1B (Specialty Occupation) and L-1 (Intracompany Transferee) immigration status. The USCIS Fraud Detection and National Security unit (FDNS) has initiated these visits as part of the Department of Homeland Security's (DHS) efforts to expand worksite enforcement. USCIS has hired a large number of private contractors to conduct thousands of site visits and verify information from the I-129 petitions filed with the agency.

As part of these site visits, the FDNS assessors may visit the workplace unannounced or with very short notice. Typically, they will ask questions of nonimmigrant workers, administrative personnel and supervisors. Most questions will directly relate to the information submitted with the I-129 petitions in order to confirm accuracy. FDNS assessors may ask to review previously submitted I-129 petitions, Labor Condition Applications (LCA), and W-2 records for the employee in question.

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When an assessor arrives, the employer may ask to have outside counsel present for these site visits either in person or by telephone. Any significant compliance issues detected may result in follow-up field investigation by Immigration and Customs Enforcement, and any wage violations based on the data submitted with the Labor Condition Application may be shared with the Department of Labor. USCIS may also revoke the approval of H-1B or L-1 petitions if the employer or employee is found to have violated the terms or conditions of the petition, or if statements in the petition are found to be inaccurate.

In order to prepare for these possible site visits, employers should establish a company compliance officer or designated representative to establish a plan of action and audit internal records to confirm the accuracy of L-1 and H-1B petitions filed. Employers should take the opportunity to review I-9 records and LCA Public Access files, as well as copies of prior L-1 and H-1B filings to confirm if work site locations have changed, salary amounts have been reduced or job duties have materially changed. If any material changes have occurred since the filing, the employer should file an amended petition or new LCA. The Human Resources department and all supervisors of H-1B and L-1 employees should be informed of possible site visits and advised that they may need to be available for questioning by FDNS assessors.

The USCIS Service Center for the eastern half of the United States has confirmed that it has transferred approximately 20,000 cases to FDNS for site visits. It is assumed that the USCIS Service Center for the western half of the country has also forwarded a comparable number of cases to the unit. Based on these numbers, it appears that assessors will visit a large number of employers within the next few months. If your company is contacted by an FDNS assessor, we recommend that you call your designated Vedder Price professional immediately to discuss options, including the possibility of having counsel present during the site visit.

Social Security No-Match Rule Rescinded

After years of controversy and litigation in the federal courts, the U.S. Department of Homeland Security (DHS) has rescinded the Bush administration's 2007 Social Security "no-match" rule. Previously, implementation of the regulation was blocked by court order shortly after it was issued, and the regulation has never taken effect. The rule established procedures that employers could follow if they receive no-match letters from the Social Security Administration (SSA) or notices from DHS

that call into question work eligibility information provided by employees. These notices most often inform an employer many months or even years later that an employee's name and Social Security number provided for a W-2 earnings report do not match SSA records—often due to typographical errors or unreported name changes. DHS issued a rule declaring that failure to take specified action upon receipt of a no-match letter may place employers at risk of prosecution for knowingly employing undocumented workers with respect to whom no-match letters had been issued.

Under the new final rule, which took effect on November 7, 2009, the receipt of a no-match letter is no longer expressly mentioned as a situation that will justify the conclusion that the employer had constructive knowledge of an employee's lack of eligibility to work in the United States. However, an employer's constructive knowledge of an employee's unauthorized work status may be inferred from the "totality of the circumstances" relating to an employer's failure to take reasonable steps to verify an employee's employment eligibility upon receipt of a no-match letter. DHS further states that it will focus its enforcement efforts "relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs." Employers should be mindful of possible liability for failure to take action upon receipt of these notices even in light of the rule's rescission.

Which Form I-9 Should I Use?

As a reminder, employers should be using the most recent Form I-9 found at www.uscis.gov/i-9, which includes the form's most recent version from August 2009. In addition, USCIS has indicated that the prior version (February 2, 2009) is also acceptable. These versions contain the revised list of documents acceptable for employment verification. Employers should use the new Form I-9 for newly hired employees as well as for any needed reverification of work authorization.

Diversity Visa Lottery Registration Has Begun

Online entry registration for the Diversity Immigrant Visa Program 2011 began on October 2, 2009 and will be open through noon (EST) on November 30, 2009. The congressionally mandated program makes available 50,000 diversity visas (DV) annually. DV applicants who meet strict eligibility requirements from

countries with low rates of immigration to the United States are selected randomly from all entries. For the DV-2011 Lottery Program, natives of the following countries are *not* eligible to apply because they are “high admission” countries: Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Peru, Philippines, Poland, South Korea, United Kingdom (which includes Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena and Turks and Caicos Islands, but not Northern Ireland), and Vietnam. Foreign nationals born in Hong Kong SAR, Macau SAR and Taiwan are eligible for the Diversity Visa Lottery. Applicants may submit a free online application through the Department of State website, <http://www.dvlottery.state.gov/>. The Federal Trade Commission has issued a reminder that there is no fee to apply for the DV Lottery, and applicants should beware of unscrupulous persons or organizations that charge a fee to apply for the DV lottery and promise a guaranteed result.

H-1B Visas Still Available

Unlike prior years, USCIS announced on April 8, 2009 that the H-1B quota for fiscal year 2010 (October 1, 2009 through September 30, 2010) had not been met during the initial filing period (April 1, 2009 through April 7, 2009). As of November 2009, USCIS continues to accept H-1B petition filings for this fiscal year. USCIS stated that it will continue to monitor filings and notify the public when the annual quota has been met. It appears that due to the current economic conditions, employers have not filed as many petitions as they have in the past.

Holiday Travel Alert

As a reminder for all foreign nationals who will be traveling during the November to January holiday season, most U.S. Embassies and Consulates are currently scheduling nonimmigrant visa appointments for this travel period. We encourage travelers with expired nonimmigrant visas who will need an in-person interview to contact Vedder Price for assistance in scheduling interview appointments at least eight weeks in advance of anticipated travel. Employers should ensure that the employees are able to obtain their visas during the holiday period and return to the United States in a timely manner.

E-Verify Program Extended for Three More Years

On October 28, 2009, the President signed into law a bill that renews the E-Verify electronic employment verification system for an additional three years. The provision extending the program was included in a \$42.8 billion appropriations measure that will fund the Department of Homeland Security (DHS) for the next fiscal year. It allocates \$137 million to improve E-Verify’s accuracy and compliance rates and \$135 million for Immigration and Customs Enforcement to hire special agents for workplace immigration audits.

E-Verify is an electronic employment eligibility verification system operated by the U.S. Department of Homeland Security. E-Verify allows employers to electronically confirm the biographical and immigration data of their employees utilizing DHS and Social Security Administration databases.

Reminder: Federal Contractors/Subcontractors Required to Register for E-Verify

On September 8, 2009, regulations went into effect that will require many federal contractors and subcontractors to register for the E-Verify system. Unless exempt, all prime federal contracts awarded and solicitations issued after September 8, 2009 must include a clause mandating the use of E-Verify for all employees hired during the contract period as well as for all existing employees assigned to perform work under the contract. The same clause also will be required in subcontractors’ contracts valued at over \$3,000 for services or construction.

Exemptions from this new federal contractor rule exist for contracts of fewer than 120 days in duration, contracts for commercial off-the-shelf (COTS) items, prime contracts valued at less than \$100,000 and contracts under which the services will be performed outside of the United States. Some existing indefinite delivery/indefinite quantity (IDIQ) contracts will be subject to modification to include the E-Verify requirement. Different obligations apply if the employer is an institution of higher education or a state or local government, or in other limited circumstances.

Employers awarded a federal contract that includes the E-Verify clause will be required to enroll in E-Verify within 30 days of the contract award date if they are not already using E-Verify. In addition to verifying all new hires through E-Verify, federal contractors required to use E-Verify will have the option of reverifying the work authorization of either the employees working on the federal contracts or all existing employees, which is not currently permitted. In the event that

an employer elects to reverify all employees, the employer must notify DHS and must initiate verifications of the entire workforce within 180 days of its notice to DHS.

Please note that federal contractors/subcontractors are not required to register for E-Verify until they receive a contract award that contains the E-Verify provision. It is a violation of the law to reverify existing employees using E-Verify unless and until the employer is mandated to do so by the E-Verify provision.

We strongly recommend that employers conduct an internal audit of their I-9 records to resolve any I-9 issues before they are required to reverify current employees who will be assigned to federal contracts. This will help ensure that the employer maintains accurate I-9 data before submitting this information to the federal government.

In the event that you believe your organization may be subject to these new regulations, please contact your Vedder Price attorney to assist you in determining whether you will be required to register for E-Verify and to assist you in auditing your I-9 records, enrolling in E-Verify, executing the required Memorandum of Understanding with the government and training your HR professionals.

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About Vedder Price

Vedder Price P.C. is a national business-oriented law firm with 250 attorneys in Chicago, New York and Washington, D.C.

The Vedder Price Business Immigration Group

Vedder Price provides a full range of business immigration services. Building on the firm's expertise in corporate compliance and best practices, we work with clients to develop policies and internal processes to ensure compliance with federal and state-level immigration laws and minimize exposure to civil and criminal immigration enforcement. We provide proactive advice to best position a company and its workforce before and after corporate changes, including acquisitions, mergers, divestitures and reorganizations. The firm assists clients in obtaining temporary and permanent immigration status for their executive, managerial and professional employees in virtually every visa category. Together with the firm's tax, benefits, executive compensation, estate planning and employment lawyers, we help clients develop and serve their global workforce.

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