

## **THE AUDIT**

### **TARGETING EMPLOYERS**

The INS conducts well over 60,000 I-9 inspections per year. Since IRCA has been the law since 1986, INS is becoming increasingly less inclined to educate employers on their legal responsibilities and more likely to impose sanctions. Given the mood of Congress, INS investigators are likely to become more aggressive in the future.

The INS Field Manual for Employer Sanctions sets forth guidelines for targeting employers for I-9 inspections. INS investigators follow leads from various public and private sources. The Department of Labor (DOL) is a favorite INS resource for ferreting out employers of illegal aliens. DOL officers conduct routine inspections for employer compliance with the wage and hour laws. Such inspections often include a cursory review of an employer's I-9 files. While DOL officers do not cite employers for IRCA violations, they do advise INS of employer missteps. The DOL will also notify the INS of possible IRCA violations upon receipt of an application for alien labor certification, the first step in the process of obtaining permanent residence for a foreign worker, if DOL suspects that the employee is presently working illegally for the sponsoring employer.

INS does not always wait for a lead. INS has implemented a "General Administrative Plan" whereby it draws employers from a national database of several million employers. The Plan targets specific industries with a reputation or history of hiring unauthorized workers (food, textile and garment, in particular), but no company is safe from the provisions of the plan which authorize employers to be selected randomly for audits.

### **AUDITING PROCEDURES**

Under IRCA, INS cannot do surprise audits, but must provide employers with at least three days notice of its intent to conduct an I-9 inspection. This notice need not be in writing.

It is not unusual for an INS investigator to initiate an investigation by phone or to simply appear at the employer's office. By asserting its legal right to three days notice, the employer will have the opportunity, as provided by INS regulations, to choose the location of the inspection as well as to review, and even correct, technical mistakes on the I-9's. The correction of mistakes before the actual inspection may permit the employer to mitigate the amount of the fine. However, under no circumstances should an employer destroy an I-9 which has been incorrectly completed or backdate a newly completed I-9.

At the time of the inspection, INS investigators will ask to see the original I-9's and review them for possible violations. If the I-9's are on microfiche, the employer is obligated to provide a microfiche reader-printer at the inspection sight. The investigator's authority is limited to review of the I-9 records. This authority does not permit the investigator to enter a non-public area of a building without either the employer's consent or possession of a valid search warrant. Similarly, an investigator may not speak

to the employees on company premises unless the employer consents or he is in possession of a court-issued warrant, subpoena or where "exigent circumstances" exist. (See footnote).

After the inspection, INS will contact the employer if there are discrepancies between INS records and employee documentation. A common scenario is where a green card supporting the I-9 appears to belong to someone other than the employee. Should this happen, the employer should ask the specific employee in question to clarify his or her status in the event that INS is mistaken or request new and different documentation to verify employment eligibility. The employer should be prepared to terminate employment immediately if any employee fails to comply with this request. Otherwise, the employer could be charged with knowingly employing an unauthorized worker.

## **NOTICE OF INTENT TO FINE**

At the close of the investigative phase, the INS may issue a Notice of Intent to Fine (NIF) if it determines that a violation has occurred. The NIF will allege that an employer has violated IRCA in one of the following ways: (a) the employer knowingly hired an unauthorized alien, (b) the employer continued to employ an unauthorized worker (c) the I-9 records were deficient (i.e., there were paperwork violations); and/or (d) the employer failed to provide the INS access to the I-9 records in a timely fashion.

The NIF will recite all of the facts and alleged violations and set a proposed penalty. Upon service of the NIF, an employer has 30 days to contest the NIF and to ask for a hearing before an Administrative Law Judge (ALJ). An employer's failure to request such a hearing will result in a final order.

If an ALJ rules against an employer, the employer has 45 days to file a petition in the Court of Appeals for the appropriate circuit for review of the order.

## **MITIGATING PENALTY AMOUNTS**

The proposed penalty amounts contained in a NIF can be mitigated, sometimes by up to fifty percent, upon negotiation with the INS district counsel or by the ALJ. Both statutory and case law provide for the following five factors to be considered in the reduction of penalties:

1. The size of the business of the employer
2. The good faith of the employer
3. The seriousness of the violation
4. The employment of unauthorized workers
5. The employer's history of previous violations

First, an ALJ will look at the size of the business in question. He will assess whether the employer used all the resources at his disposal to comply with IRCA. He will also

determine whether an increased penalty would be likely to assure compliance in the future.

Second, the ALJ will look to the good faith of the employer. While good faith cannot itself be defined, it has been held that good faith can be ascertained by analyzing employer conduct on an ad hoc basis. In an IRCA setting, an ALJ may mitigate the amount of the fine where the employer had "honest intentions" of complying with its obligations under the immigration laws, but failed due to inadvertence or understandable error.

Third, an ALJ may consider the gravity of the violation and will often employ a "totality of the circumstances" test to determine the seriousness of the offense. For example, factors such as the ratio of employees to I-9 violations and whether the employer completed the I-9's have been used to determine the seriousness of the violation. In *United States v. Raul E. Valladares Jr.*, 2 OCAHO 316 (Apr. 15, 1994), the employer incorrectly completed seventy-four I-9 records. In response to INS' proposed penalty of \$22,050, the ALJ lowered the penalty to \$4,500, reasoning that the employer's attempt to complete the I-9s -- even incorrectly -- is less of a violation than a total failure to complete the I-9's.

Fourth, the ALJ will determine whether a particular employer has engaged in previous violations of IRCA. Past failings may lead to a finding of bad faith.

Finally, the ALJ will determine whether a paperwork violation actually involved the hiring of an unauthorized alien. ALJs often are more lenient when the employee who was the subject of the paperwork violation was authorized to work. Where there is no harm, the ALJ is unlikely to call a foul. (See footnote for actual cases lowering penalty amounts.)