

# Management Alert



## Targeted ICE Investigations - In It For The Long Haul With Record \$95 Million Plea Deal For I-9 Violations

By Mahsa Aliaskari

**Seyfarth Synopsis:** With a record \$95 million plea deal for I-9 immigration violations following a six year investigation, the outcome for a Pennsylvania company with operations nationwide serves as a reminder of the federal government's unwavering commitment to investigating and enforcing of immigration laws. A look at the facts behind the headlines helps us understand where, when and why company general counsel and the C-suite should take a proactive approach to immigration compliance. If nothing else a judgment of \$95 million solidifies that the Form I-9 is not really "just" a simple form, and the government can and will use a variety of tactics to enforce compliance with the Immigration Reform and Control Act (IRCA).

Following a six year investigation, the U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) unit issued a statement confirming a guilty plea on September 28, 2017 by Asplundh Tree Experts, Co. (Asplundh) for unlawfully employing undocumented workers. As part of the plea agreement, Asplundh received a sentence to pay a forfeiture money judgment in the amount of \$80 million dollars, abide by an ICE HSI Administrative Compliance Agreement, and pay an additional \$15 million dollars to satisfy civil claims arising out of their failure to comply with immigration law. Prior to this, the often touted "record settlement" included IFCO Systems North America Inc.'s (IFCO) \$20.7 million dollars from 2006.

While the facts of this case reveal the company to be an egregious violator, there are parts of this story that may ring true for many companies. The story of Asplundh, similar to the stories of IFCO, Abercrombie and Fitch, Chipotle and many others, should serve as both an informative and cautionary tale. While each of these companies faced different challenges and immigration violations, the lessons in each should help general counsel and the C-suite at companies appreciate the importance of taking stock of their own practices and putting into motion an action plan designed to mitigate risks and liabilities where possible. If nothing else, a judgment of \$95 million solidifies that the Form I-9 is not really "just" a simple form and the government can and will use a variety of tactics to enforce compliance with the Immigration Reform and Control Act (IRCA).

We also cannot bury our proverbial heads in the sand and ignore recent Executive Orders changing ICE's [immigration priorities](#), and promoting "[Buy American, Hire American](#)" policies. While we have not yet seen the worksite raids we experienced under the Bush Administration or widespread "desk audits" or "silent raids" of Forms I-9 under the Obama administration, ICE is here for the long haul and future worksite investigations, on-site visits and Form I-9 audits can be expected. This will be especially true as we see an increase in resources allocated to meet the current administration's priorities in this arena.

## The Story Behind Asplundh

Described as one of the largest privately-held companies in the United States, and headquartered in Willow Grove, Pennsylvania, Asplundh is now also known as the company that pled to the largest civil settlement agreement ever levied on an immigration case - how did they get here?

ICE's six - year investigation found that Asplundh employed a scheme where employees were hired and re-hired even when lower level managers were aware of the fact that the employees were not authorized to work in the United States. But more importantly, the charges noted that "[the highest levels of Asplundh management remained willfully blind.](#)" Even before the September 28th announcement of the settlement agreement following the guilty plea, the Department of Justice (DOJ) U.S. Attorney's Office [announced on September 19, 2017](#) that three employees, including supervisors and a Vice- President, had already entered guilty pleas to felony counts of conspiracy to commit fraud and misuse visas in connection with this case, with each defendant facing prison time and fines.

ICE Acting Director Thomas Homan stated in its [September 28th announcement](#) that "[t]oday's judgment sends a strong, clear message to employers who scheme to hire and retain a workforce of illegal immigrants: we will find you and hold you accountable. Violators who manipulate hiring laws are a pull factor for illegal immigration, and we will continue to take action to **remove this magnet**" (emphasis added).

The [charge](#) was for one count of unlawfully employing aliens. Statements from ICE and the (DOJ) U.S. Attorney's Office describe a company practice where a decentralized hiring practice reinforced and supported the acceptance of fraudulent documentation presented to company representatives by new hires and re-hires in regions across the United States. More specifically, as noted in [ICE's statement](#), the six year investigation revealed that from 2010 to 2014, "the company decentralized its hiring so Sponsors (the highest levels of management) could remain willfully blind while Supervisors and General Foremen (2nd and 3rd level supervisors) hired ineligible workers, including unauthorized aliens, in the field. Hiring was by word of mouth referrals rather than through any systematic application process. This manner of hiring enabled Supervisors and General Foremen to hire a work force that was readily available and at their disposal." The purported motivation for this national industry leader in tree trimming and brush clearance for power and gas lines - a motivated workforce willing and able to relocate at a national level as needed to respond to weather related events requiring Asplundh crews.

While details of the Administrative Compliance Agreement have not yet been released, given the charges and facts disclosed it is likely the company will be required to take action on a number of fronts. As noted in the company's [own statement](#), Asplundh has already taken some corrective action, including:

- Appointing a Compliance Specialist trained in fraudulent document identification in each Asplundh region nation-wide.
- Revising hiring procedures to verify each identification examination for every new hire.
- Investigating every complaint of potentially undocumented workers.
- Retaining a third party consultant to review actions and procedures.
- Presenting the company compliance program to ICE for review.

These corrective actions are reminiscent of what we saw with [IFCO](#) and changes that IFCO made in 2006 as part of its agreement with ICE. Recent history has shown us ICE's unwavering commitment to its investigations and enforcement of immigration laws regardless of the name or party controlling the Oval Office.

## What Does This Mean for Your Operations?

The key for all employers is to take all necessary and possible steps that will protect the company from a charge and a subsequent finding of knowingly or intentionally hiring undocumented workers. While all employers may not be able to guarantee full compliance, everyone can and should take steps that will provide an affirmative defense against charges and allegations of willfully employing undocumented workers or simply being careless to the point that a good faith defense

cannot be made. From addressing proper form completion, document retention, remote hires, electronic I-9 vendors and detecting fraudulent documents, there are steps every company can and should take with minimal disruption to operations that can provide an affirmative defense in showing good-faith compliance with Form I-9 IRCA requirements.

Compliance with Form I-9 requirements should be a priority - not an option - for any U.S. employer. All employers, regardless of industry or size, must make a concerted effort to understand the importance of compliance, and make strategic business decisions to limit liability. Investing the time and resources necessary to develop and implement proper immigration compliance policies and protocols should be on the agenda. Businesses can begin taking a proactive approach and action on the following fronts:

- Preventative Audits - Guided internal audits of I-9 documents, processes and procedures. Do this sooner rather than later and with guidance from experienced immigration compliance counsel. Whether you choose to conduct the audit yourself or retain counsel, the results of the audit will go a long way toward assessing exposure and limiting liability either in a “desk audit” or a full on investigation. Remember, if the company has been audited once, you are on the government’s radar with secondary inspections and active investigations a possibility.
- Train, Train, Train - Human Resource teams and their delegates need to consistently and accurately complete Form I-9s. Provide them with basic knowledge of the process and the tools to recognize fraudulent identity and work eligibility documents. To become and remain compliant with IRCA and other state and federal immigration regulations training and investment in the people responsible for this function is critical.
- Improve or develop policies and procedures - Often we see issues relating to immigration compliance handled ad hoc, with larger entities taking a more “decentralized” approach. Time and again we see that leaving immigration compliance at the lowest rung of priorities increases risks and liabilities. When the process is identifiable, then accountability can be, too.
- Manage compliance - Policies and procedures do not mean anything without proper implementation and monitoring. Lack of compliance where immigration and IRCA mandates are concerned carries fines and penalties that includes prison terms for individuals. For the company it can also mean a PR nightmare. Dedicating top management level resources to oversee a company’s immigration compliance program should be a top consideration.
- Prepare for possible workplace disruptions - Whether the current Administration steps up enforcement actions is not really the motivating factor. As depicted in the excerpt below from the Department of Homeland Security – U.S. ICE Worksite Enforcement FY 2014 annual report, we have continually seen ICE conduct long, exhaustive investigations, with an increase in audits and related fines and penalties. The following table reflects the number of opened and closed worksite enforcement investigations, criminal and administrative employee and employer arrests and the assessed fines and collections for each fiscal year from the annual report.

Year	Cases Initiated	Cases Closed	Criminal Arrests of Employers	Criminal Arrest of Employees	Administrative Arrests	Total \$ Amount of Fines Assessed	Total \$ Amount of Fines Collected <sup>2</sup>
2007	1,093	867	92	771	4,077	\$26,560 <sup>3</sup>	\$26,560
2008	1,191	713	135	968	5,184	\$675,209 <sup>4</sup>	\$426,616
2009	1,461	1,109	114	296	1,644	\$1,033,291	\$1,063,608
2010	2,746	1,942	196	197	1,224	\$6,956,026	\$5,824,082
2011	3,291	2,356	221	492	1,471	\$10,463,988	\$8,083,469
2012	3,904	3,176	240	280	1,118	\$12,475,575	\$8,314,509
2013	3,903	3,082	179	273	868	\$15,808,365	\$8,942,371
2014	2,022	3,124	172	190	541	\$16,206,022	\$7,331,026

For more than sixteen years, since the infamous worksite raids under the Bush administration, we have watched enforcement actions increase regardless of the party controlling the executive branch. Whether a particular form of enforcement action becomes more prevalent or not, should your company be investigated, severe losses could occur and planning for potential impacts on workforce availability in advance can prove to be critical to limiting disruption to ongoing operations.

As ICE investigations continue and potentially expand under Presidential Executive Orders or future Presidential Proclamations, it is more important than ever for employers to protect themselves by ensuring that proper immigration compliance policies are in place and in-house audits are conducted on a regular basis to detect potential issues and irregularities. As demonstrated in Asplundh, the stakes are high, employer responsibilities as well as liabilities under IRCA should be taken very seriously.

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