

# Management Alert



## ICE I-9 Audits on the Rise: Act Today to Prevent Issues Tomorrow

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**Seyfarth Synopsis:** Immigration and Customs Enforcement (ICE) increases worksite enforcement by more than 50%. What should employers understand to prevent fines and minimize reputational risk?

Since the start of fiscal year 2018, ICE has increased worksite enforcement actions by over 50%. Compared with fiscal year 2017, administrative arrests have increased nearly 400% while worksite investigations have risen from 1,716 to 3,510—with the last quarter of the fiscal year remaining for these numbers to increase.<sup>1</sup> ICE appears to be making good on the remarks made by leadership to increase worksite enforcement “four to five times.”

### By the Numbers

ICE Homeland Security Investigations’ (HSI) numbers speak for themselves: 3,510 worksite investigations, 2,282 I-9 audits, and 594 criminal and 610 administrative worksite-related arrests.<sup>2</sup> For comparison, in fiscal year 2017, HSI opened less than half the number of worksite investigations, almost 1000 less I-9 audits, and far fewer criminal and administrative arrests.<sup>3</sup> Even with lower numbers in fiscal year 2017, the cost to companies was still high: \$97.6 million in forfeitures, fines, and restitution with a further \$7.8 million in civil fines. While the fiscal year 2018 number of enforcement actions may not rise exactly by “four to five times,” companies should not ignore the possibility of being a target.

### Why the Rise?

ICE says increased worksite enforcement protects jobs for U.S. citizens and other lawfully employed workers. With the Administration’s “Buy American, Hire American” (BAHA) Executive Order and the White House’s focus on immigration, ICE views its actions as fulfilling its obligations under BAHA. Although ICE has not experienced the increased funding some expected (at least, not yet), the Agency has moved resources from other areas to cover the rising expense for worksite investigations. While this ramped up enforcement may appear unsustainable, ICE clearly views it with renewed vigor and as a central pillar of its mission. California, in particular, appears to be bearing the brunt of the initial wave of ICE/HSI’s actions with 122 Notices of Inspection (NOIs) issued in the Los Angeles area alone over a five day-period and a further 77 NOIs served throughout Northern California, including San Francisco, San Jose, and Sacramento.

<sup>1</sup> See <https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-already-double-over-last-year>

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

## What's an NOI?

An NOI initiates a government administrative inspection of a company's Forms I-9. NOIs are considered administrative tools used to assist in criminal investigations. Much like the prior administration, current HSI leadership considers civil administrative audits to be just one of many tools ICE can use to reduce the demand for unauthorized unemployment and protect opportunities for U.S. workers. The current enforcement strategy also includes the expanded use of civil penalties, employer audits, and debarment.

## More to Come

California isn't alone in experiencing this spike in NOIs. ICE has made its way East and has served NOIs throughout the Midwest and East Coast. NOIs come in all shapes and sizes with targets including companies that conduct business in areas designated as critical infrastructure, including ports of entry and construction projects, as well as food manufacturing, logistics, media, manufacturing, and healthcare. No one is immune.

Not only this, but ICE has publicly stated that it plans a summer swell of NOIs with the number of audits exceeding 5,000 by the end of September 2018. In comparison, ICE I-9 audits previously peaked at around 3,100 in 2013. Additionally, the Agency has dusted off a plan from its past, seeking to further develop an initiative to centralize employer audits in one location—the Employer Compliance Inspection Center, located near ICE's Washington, DC headquarters. Coupled with outside technology being developed to electronically scan documents and review I-9s utilizing artificial intelligence, the Agency hopes to place hundreds of auditors and a team of attorneys at the Center, allowing ICE to routinely audit 10,000 to 15,000 companies annually.

The Acting Executive Associate Director for HSI, Derek N. Benner, has said that he views HSI and the audits it undertakes as akin to the work of the IRS: Companies should expect NOIs to become more routine and, in a sense, as another cost of doing business. It comes as no surprise, then, that we are seeing a shift back to companies reprioritizing immigration compliance and considering outside and possibly internal audits (conducted by trained subject-matter experts).

Companies should not only prepare for a NOI but also work to prevent noncompliance. Left unsaid by ICE, in this time of heightened immigration scrutiny, the optics of a worksite enforcement action, or being named and shamed by HSI, could cost more than any potential fine.

## What Can Employers Do?

**1. Internal Assessment, I-9 Audits and Remediation.** The Form I-9 is said to be the most complicated 3-page form in America. Companies should consider an internal I-9 audit under the direction of experienced counsel. Before deciding to take a full audit, however, companies should consider an internal assessment of policies, processes, and a sampling of I-9s. Such an assessment may be more appropriate and cost effective. Then, decide if a full I-9 review or broader cross section is necessary. Perhaps even more important than the audit itself is the remediation of the Forms I-9 after identifying paperwork violations, missing I-9s, expired work authorizations, fraudulent documents, and other issues. Acting on the results is key, and the more serious issues should be addressed as quickly as possible. Being proactive will reduce fines and penalties and also establish a good faith defense in the event of an ICE audit.

**2. Review/Establish Policies and Procedures.** Management cannot turn a blind eye to what is happening in the field, and should insist upon compliant practices. Don't Ask, Don't Tell-based immigration policies are something ICE appears to be interested in targeting. Companies should look at pre-hire applications, I-9 retention schedules, photocopying policies, Social Security number-related "mismatch" issues, reverification, and other processes to ensure compliance with the law and, from an anti-discrimination perspective, consistency.

**3. Be Proactive.** Do not ignore government notifications including Affordable Care Act health insurance notices and other unconventional Social Security no-match notifications (such as unemployment claims of employees not working at your company) or potential identity theft issues. Do not ignore existing liability on the books, including individuals whose I-9s indicate that they are unauthorized to work. Consider the use of E-Verify and other government recommended best practices. Review IMAGE best practices (<https://www.ice.gov/image>) and consider attending an HSI IMAGE training.

**4. Train, Train, Train.** While tight policies and procedures can reduce errors, the churn of HR personnel, combined with the new Form I-9 and updated USCIS guidance, make ongoing reinforced training, job aids, and in-house subject matter expertise critical. Aside from imparting technical knowledge, trainings should highlight the importance of the Form I-9 and the need to take the process seriously. Review free government related online resources and organize an accessible library for your I-9 Administrators and keep that space up to date.

**5. Prepare for a Government Visit.** We have written in depth about how a company may prepare for an eventual knock at the door by the government. Regardless of industry or company size, this is an event for which every company should have a plan. Based on recent trends, companies that have had ICE over in the past 5 years should be ready for another visit as follow-up actions for companies dinged in the past are expected.

This is the time to pay attention and invest resources—it is crucial that companies prioritize compliance today to prevent problems tomorrow.

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