

AILA Fall Conference 2013

Texas, New Mexico, Oklahoma Chapter

I-9, E-Verify & Trends in Workforce Enforcement



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The World of Immigration Compliance

- Regardless of whether you have a single foreign national employee, immigration law is still relevant.
- Compliance and peace of mind during a time of corporate investigation and prosecution.
- Terms of Interest
 - E-Verify, I-9, internal audits, social security
 - No-Match Letter procedures
 - Representation in criminal-immigration investigations, worksite raids, federal contract debarment actions, subcontractor liability

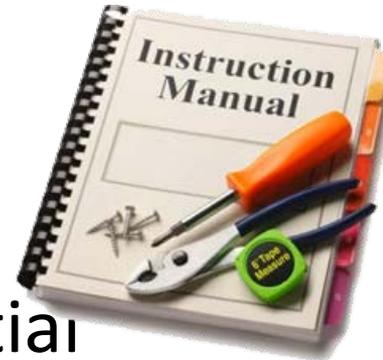


The NEW Form I-9

- The government is enforcing immigration law by shifting the obligation to employers to be compliant or face heavy fines.
- The Form I-9 is the essential tool for employment compliance with immigration law.
- The Form I-9 is required for every current employee hired after November 6, 1986.
- A two-page form with over 70 pages of instruction and over 80 different kind of potential errors.

Key Issues with the New I-9

- [New I-9](#) must be used after May 7, 2013.
- Form has been separated into 2 pages.
- Greater information gathering for potential audits.
- Changes to the list of acceptable documents.
- Increased clarity on instructions.
- [M-274 Handbook](#) for Employers UPDATED on 3/8/13.
- Impact of automated Form I-94s



ICE Fine Calculations

Fine calculations made strictly on the following factors:

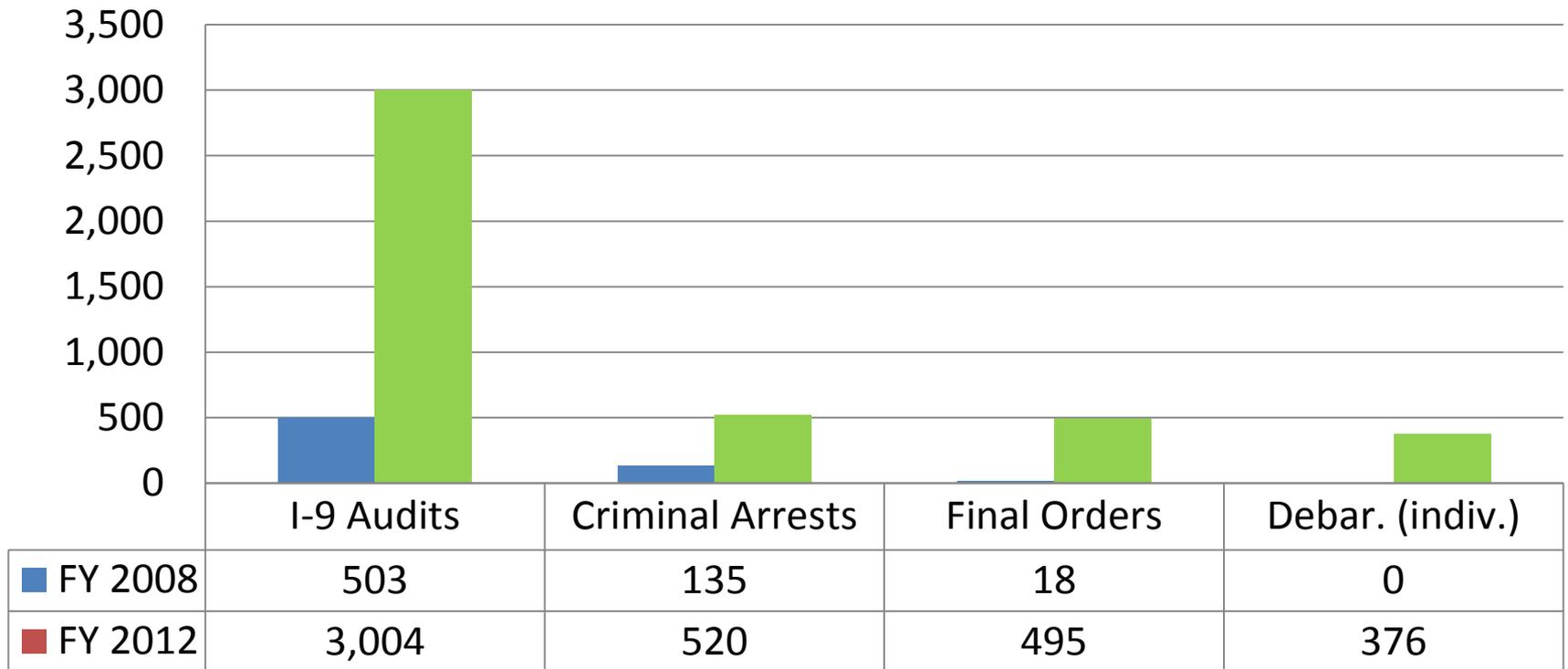
- 1) Percentage of substantive errors and uncorrected technical errors (+50% error rate = \$935 per form fine)
- 2) Previous offenses can double or triple the fines
- 3) Mitigating factors: Business size, good faith, seriousness of violation, unauthorized aliens, history. (Mitigating factors can increase the total fine by 25%.)

KEY SUBSTANTIVE I-9 VIOLATIONS

1. Failure To Complete Form I-9 For Each New Hire
2. Failure to Produce For Each New Hire in Audit
3. Lack of Employee Signature in Section 1 of Form I-9
4. Lack of Employee Status Attestation in Section 1
5. Multiple Employee Status Checks in Section 1
6. Lack of Employer attestation and signature in Section 2
7. Improper Document Description in Section 2
8. Failure To Complete Section 2 Certification and Enter Date of Hire Within Three (3) Days of Hire

I-9 Enforcement

ICE Enforcement Efforts by the Numbers



FY 2012 Fines = \$12,475,575.00

Audit & Investigation Triggers

- Random Audit
- Targeted Audit Due to Industry
- Re-Audit
- Employee Complaints
- Referral From Another Government Agency
- Random Complaints to ICE Hotline

Anatomy of an Audit

- Notice of Inspection: 3 days to submit all I-9s.
- Notice of Technical Errors: 10 days to correct all technical errors.
- Notice of Suspect Documents: Potential termination of employees and creation of a fearful employee base.
- Notice of Intent to Fine: Stiff penalties for simple errors.
- Notice of Debarment from Federal Contracts: Loss of federal contracts and new federal contract bids.

Could lead to **Criminal Prosecution.**

Hypothetical

Hypo Corporation has 100 employees currently on payroll and terminated 20 employees in the past year. ICE requests all I-9s for current employees and employees terminated within the past year. Hypo Corp's HR manager finds all I-9s of the current employees and 15 of the terminated employees I-9. Assuming the employer has a typical rate of failure (50%), what is the fine the ICE will likely impose.

Answer

Assuming ICE finds 50% of your I-9s have failed or were not corrected, 60 I-9s would be considered to have substantive violations.

Applying a standardized I-9 calculation, the file would be $60 \times \$935$ for a total fine of \$56,000 or higher.

Federal Contract Debarment

A first time offender with a single count of knowing to continue to employ an unauthorized foreign national can be recommended for Federal Contract Debarment.

E-Verify

Free service which confirms work authorization data to government databases

Does not replace the Form I-9

Mostly likely to become mandatory on a national level, but already required in various jurisdictions

Advantages for foreign students

Provides leverage for ICE negotiations

Provides opportunity for data collection by the Office of Special Counsel and other agencies

Immigration Byproducts

- Immigration Status Is Irrelevant to Coverage under NLRA, FLSA, OSHA, TITLE VII, the ADA, state workers compensation and discrimination statutes.
- Texas Workforce Commission will investigate complaints on behalf of undocumented workers.
- Wage claims from undocumented workers are very common.
- INA Sec. 274 Prohibits discrimination against those authorized to work.

Immigration and the SSA

Aramark Facility Services v. SEIU

Listing of Worker's SSN in "No-Match" Letter Not Sufficient to Establish Constructive Knowledge That the Worker is Employment-Ineligible.

Notes:

SSN No-Match Inquiries from Third-Party sources can also trigger Investigations. Compliance policies should address no-match protocols.

Immigration and SEC

- **Chipotle Mexican Grill**

Inter-agency referral to SEC

The Denver-based company fired hundreds of workers in 2010 and 2011 after audits by ICE arm turned up undocumented workers on payrolls in Minnesota, Virginia and Washington, D.C.

ICE expanded the investigation to a national level and then referred the matter to SEC for investigation of hiring practices.

Notes – Employers (and their attorneys) must be very careful when undertaking an audit, to ensure the appropriate balance between I-9 regulations and risking charges of discrimination

Immigration and Unions

- **NLRB Orders No E-Verify (Hyatt San Francisco)**

Enrollment in E-Verify in those situations may implicate potential violations of the National Labor Relations Act when done so without bargaining with the relevant bargaining units.

Notes – Careful review and counsel is needed when implementing E-Verify for a national organization that is required to participate in certain jurisdictions.

Impact of Audits on Business Operations

- **Abercrombie & Fitch (2010)** – Involved the investigation of the Michigan stores of Abercrombie & Fitch (note – only the Michigan stores were impacted by the investigation, it did not go nationwide), resulting in fines for paperwork/technical violations only of \$1,047,110. That's over a \$1M fine for just technical violations, in just the Michigan stores. The investigation started in one store in Michigan in 2008, and the fine was assessed two years later after the investigations spread to all stores in that state. The company had moved to its own electronic I-9 system that it created on its own.
- **American Apparel (2009)** – In 2009, American Apparel had approximately 5600 U.S. employees. After conducting an investigation for approximately 18 months, ICE notified the retailer that it suspected that the documents from approximately 1600 employees were fraudulent, and that it could not verify the information presented by another 200 employees. The company was forced to provide notices to these affected employees that they would have to meet with ICE officers and present valid documents or face termination. The audit of their paperwork continued and was expanded to a national level.

Proposed Immigration Reform In the Area of Workforce Enforcement

- Changes to employment verification (I-9s and E-Verify)
- Employers will face complex issues related to identity theft, misrepresentation and E-verify/Immigration compliance implementation

QUESTIONS?

