JONES WALKER

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LABOR & EMPLOYMENT

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AS WINTER APPROACHES, BE PREPARED FOR ICE . . . INSPECTIONS

Last week, U.S. Immigrations and Customs Enforcement ("ICE") Assistant Secretary, John T. Morton, announced that ICE was issuing Notices of Inspection ("NOI"s) to 1,000 employers across the country in an attempt to identify and penalize employers who are not complying with employment eligibility verification laws. This announcement came on the heels of another recent ICE initiative—conducting on-site audits of H-1B applications. While the debate regarding immigration reform continues, one thing is clear: ICE is dramatically increasing its presence and monitoring of companies, so you need to know both how to prepare for and how to respond to these audits and inspections.

H-1B Audits: Dot Your I's and Cross Your T's

Whether you have already filed an H-1B petition or plan to do so in the near future, it's more important than ever to make sure you are in strict compliance with the laws. That $500 "Anti-Fraud Fee" employers pay to the government as part of the fees associated with an H-1B petition is being used to fund comprehensive inspection programs. According to USCIS, employers are being selected for review randomly, and site visits will be conducted without advance notice. Inspectors will be looking to see whether: (1) the company that submitted the petition is an actual operating business; (2) the foreign worker being sponsored is a legitimate employee; and (3) the foreign worker is being paid the appropriate salary and is performing the duties set forth in the application. In short, the inspectors will be trying to determine whether an H-1B application was fraudulently filed. Inspectors may meet with and interview the foreign worker and Human Resources professionals to examine these issues.

What can you do to prepare for this inspection? Make sure your Public Access File is up to date and contains the necessary documents, such as:

- A copy of the Labor Condition Application ("LCA") (Form ETA 9035), and cover pages (Form ETA 9035CP)
- The LCA containing original signature (if submitted by fax)—an original of this document does not necessarily have to be kept in the public access file but must be kept on file by the employer; it is sufficient to keep a copy of the signed LCA in the public access file, particularly if multiple files are maintained for multiple foreign workers included in the same LCA
- A statement of the current rate of pay for each H-1B worker admitted under the LCA
- A copy of the prevailing wage determination for each area of employment
- A memorandum explaining how the employer calculated the actual wage for the job, without identification of the H-1B worker or the other workers similarly employed to the H-1B worker for purposes of determining the actual wage

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- Evidence of: (1) notification to the bargaining representative; or (2) posting of notice of the LCA filing, including the dates and locations of the posting
- A summary of the benefits offered to U.S. workers in the same occupational classifications as H-1B non-immigrants
- A statement as to how any differentiation in benefits is made where not all employees are offered or receive the same benefits and/or, where applicable, a statement that some/all H-1B non-immigrants are receiving "home country" benefits
- Where the employer undergoes a change in corporate structure and chooses to assume the LCA obligations of the previous employer, a sworn statement by a responsible official of the new employing entity that it accepts all obligations, liabilities, and undertakings under the LCA filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, and a description of the actual wage system and FIN of the new employing entity
- Where the employer utilizes the definition of "single employer" to determine its H-1B dependency status, a list of any entities included as part of the single employer in making the determination
- Where the employer is H-1B-dependent and/or a willful violator, and indicates on the LCA(s) that only "exempt" H-1B non-immigrants will be employed, a list of such "exempt" H-1B non-immigrants
- Where the employer is H-1B-dependent or a willful violator, a summary of the recruitment methods used and the time frames of recruitment of U.S. workers

If you keep this file organized and accessible, you will be in good shape should you be the subject of an on-site inspection. Just remember to keep your immigration counsel involved with any changes to the foreign worker's employment and to call your counsel immediately should ICE arrive to conduct an inspection.

What NOIs Mean for I-9 Compliance

According to ICE, unlike the employers being selected for H-1B inspections at random, employers being served with audit notices were selected for inspection as a result of investigative leads and intelligence. Audits involve a comprehensive review of Form I-9s, which employers must complete and retain for individuals hired after November 6, 1986. These forms require employers to review and record each employee's identity and work eligibility document(s) and to determine whether such document(s) reasonably appear to be genuine and related to that employee. Employers must retain I-9s for three years from the employee's date of hire or one year of separation from the company—whichever is later. This means employers must have I-9 forms for all current employees hired after November 6, 1986.

NOIs require employers to provide copies of all their employee Form I-9s and supporting documentation (if the employer normally keeps copies of such documents) by a certain timeframe. In most cases, the employer only has 3 days in which to produce its records. In addition to asking for copies of the Form I-9s, ICE may also require employers to produce,

among other things: (1) a list of all current employees with their dates of hire; (2) a list of all terminated employees with hire and termination dates; (3) copies of payroll data and/or quarterly wage and hour reports; (4) assigned account numbers if the company is a current or previous participant in E-Verify or the Social Security Number Verification Service; (5) business information to include Employer Identification Number or Taxpayer Identification Number; and (6) copies of correspondence from the Social Security Administration to the employer regarding mismatched or no-matched social security numbers.

Inspections may result in civil penalties and potential criminal prosecution of employers who allegedly knowingly violate the law. Since July 2009, ICE has imposed $2,310,255 in fines in connection with the I-9 inspections. Another 267 cases are being considered for Notices of Intent to Fine.

If served with an NOI, employers should immediately contact immigration counsel to discuss the strategy for responding to the notice. If you have not yet been served with a NOI, conduct an internal I-9 audit to ensure compliance now and make sure your forms are easily accessible and are being retained for the proper time period.

—*Laurie M. Chess* and *Jennifer F. Kogos*

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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