

Is Your Business Prepared for the Unexpected ICE Raid or I-9 Audit?

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On August 8, 2018, U.S. Immigration and Customs Enforcement ("ICE") raided 11 agricultural businesses and executed 17 criminal arrest warrants for business owners and managers charged with an alleged criminal conspiracy to exploit unauthorized workers for profit, fraud, wire fraud, and money laundering in Northern and Central Nebraska. The multi-state operation was part of a 15-month investigation based on evidence that the companies allegedly knowingly hired unauthorized workers and that many of the unauthorized workers were allegedly using fraudulent identification belonging to U.S. citizens. In connection with the investigation, immigration authorities served search warrants for hiring violations at a number of agricultural business in Northern and Central Nebraska. Among the business raided were a tomato greenhouse and potato processing facility in O'Neill, Nebraska, a town of approximately 3,700 people located 160 miles northwest of Omaha. In total, 133 unauthorized workers were administratively arrested for immigration violations as part of the raid.

As recently released statistics make clear, ICE is cracking down on employers that hire undocumented workers and is increasing the number of Form I-9 audits in an effort to create a culture of compliance among employers. From October 1, 2017 to July 20, 2018, ICE opened 6,093 worksite investigations and made 675 criminal arrests and 984 administrative arrests related to worksite enforcement. By comparison, from October 1, 2016 to September 30, 2017, ICE opened only 1,716 worksite investigations and made 139 criminal arrests and 172 administrative arrests related to worksite enforcement.

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In addition to the immense stress and business disruption caused by such unexpected raids or audits, the potential fines employers face for immigration violations are steep. Civil penalties for knowingly hiring or continuing to employ an undocumented worker range from \$559 - \$22,363 per violation and civil penalties for Form I-9 paperwork violations range from \$224 - \$2,236 per violation. Employers with multiple violations receive fines on the higher end. The factors considered by ICE in enhancing or mitigating the penalty include the size of the business, the employer's good faith effort to comply, the seriousness of the violation, whether the violation involved unauthorized workers, and the employer's history of previous violations. In egregious situations, criminal penalties may apply to company representatives.

Importantly, there are several steps employers can take proactively to (i) ensure compliance with immigration laws so that their business does not become a target, or if targeted, is protected against excessive fines, and (ii) prepare for the unexpected raid/audit.

- Conduct Form I-9 training to ensure that company representatives are properly trained in completing the Form I-9.
- Regularly conduct internal Form I-9 audits, including with the help of outside counsel, to identify and correct errors to the extent possible before being caught off guard with a government audit.
- If the company chooses to complete or retain Form I-9 electronically, verify that the system used for doing so meets regulatory requirements.
- Enroll in E-Verify, the government's online system that checks information entered on the Form I-9 against records from the U.S. Department of Homeland Security and Social Security Administration to confirm new hires are authorized to work in the United States.
- Develop a raid/audit response policy that addresses what management and employees should do in the event of an ICE raid or I-9 audit to ensure all parties are aware of their rights and responsibilities and to minimize the stress of the situation.
 - Tips on how employers should respond if ICE agents unexpectedly show up at the worksite are located in a previous NewsFlash article published [here](#).

As a final note, we recommend that all agriculture-based businesses consider use of the H-2A visa program which allows employers to bring foreign nationals to the United States to fill temporary agricultural positions. Notably, there is no limit on the number of H-2A visas which may be issued each year. In order to qualify, companies must offer a job that is of a temporary or seasonal nature; demonstrate that there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work; show that employing H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers; and

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provide the H-2A workers and U.S. workers in corresponding employment housing, transportation to the job site, and a minimum pay rate based on locale.

If you have questions about immigration enforcement or other general questions about employment-based immigration, please contact one of the immigration specialists in Koley Jessen's Employment, Labor and Benefits Practice Group.