

Compliance Convergence: ICE Enforcement

Compliance convergence can take many forms. In an article entitled “*Pass the ICE Test: Nine I-9 Record Keeping Tips*” published in the February 6, 2012 edition of the Texas Lawyer, author Karen-Lee Pollak explores one of these important areas of compliance; that being immigration and employment. Federal law requires that all employers must verify new employee’s employment eligibility within three business days of hire. US employers are generally aware of the enforcement actions by US Immigration and Customs Enforcement (ICE) which has shifted its focus to employers, through increased worksite investigations, fines and penalties. Pollak provides nine points of guidance on what lessons employers “can learn to help their companies avoid punitive fines for faulty record keeping.

Lesson No. 1: Make people responsible. Pollak believes that the “key to maintaining an effective I-9 program” is to designate specific supervisors, managers and employees to be responsible” and then provide them with continued training.

Lesson No. 2: Pick sides. There needs to be a clear document retention policy; whatever method is implemented the key is that if the company keeps some documents for some employees, “it must do so for all employees.”

Lesson No. 3: Mark the calendar. There should be a calendaring or tickler system which notifies the relevant personnel when employment verification documentation will be expiring. Ideally, Pollak believes a four month notice should be provided before such documents expire.

Lesson No. 4: Protect the paperwork. Care should be taken in your company’s filing system to keep current employee documentation separate from terminated employees. Further counsel should ensure that the company keeps all I-9 documents “in document retention schedules.”

Lesson No. 5: Schedule an audit. Pollak believes that your system should be independently tested via an audit by an “external auditor or trained employee who is not involved in the day-to-day I-9 process.” This has two benefits; first it should turn up any deficiencies in your program and allow you to correct them. Second, it demonstrates your company’s commitment to a robust compliance regime.

Lesson No. 6: Get ready. Typically there is little or no notice of an ICE audit, subsequently your company needs to be ready for any such eventuality. Pollak advises a company to draft a policy which sets out how your company will respond if the ICE auditors arrive. Other keys are to have your company’s documentation readily accessible and to have employee’s prepared for a surprise audit through training.

Lesson No. 7: Be serious. Pollak believes that a common mistake made by companies when they receive advance notice of an ICE audit is to fail to take the audit seriously. She reiterates that

such an audit is very serious business and that no matter how friendly the auditors might seem they are not friends of the company.

Lesson No. 8: Take action. Pollak advises companies to put a process in place to handle a “no match” letter from the Social Security Administration. These letters can be useful tools to put an employer on notice that there is a problem with an employee’s social security number and this is an important step not to be missed.

Lesson No. 9: Take action (II). Pollak advocates that a company should “establish self-reporting procedures for the company to report to ICE any violations or discovered deficiencies.” This will help in any enforcement action going forward.

Many in-house counsels have a wide variety of roles in their employment. For counsel in a smaller company, it may include ICE enforcement issues, as well as anti-corruption compliance and export control enforcement. Pollak has provided some solid, concrete tips for ICE compliance in her article. Many of the points she raised can be used in the broader compliance convergence context as well.

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