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Immigration and Customs Enforcement is no Longer a Paper Tiger¹

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Article at a glance

- Government audits are on the uptick and civil and criminal penalties are being levied against employers at unprecedented rates
- Employers can insulate themselves from liability by hiring an external immigration attorney auditor to conduct a compliance audit
- Conducting an external, independent audit will help employers mitigate damages, reduce exposure, and save time and money



“The amount of contingent immigration penalty liability on the books of U.S. employers is at least \$104 billion, not including criminal fines.”²

“This letter serves as advance notice that U.S. Immigration and Customs Enforcement [ICE] has scheduled a review of your forms.”³ Perhaps second only to those found on an Internal Revenue Service audit letter, these are the most feared words imaginable for an employer. Why? ICE’s Notice of Inspection arrives 72 hours before a full blown ICE audit⁴; There are more than 150 possible mistakes an employer can make on a single, one page Form I-9⁵, and potential fines range anywhere from \$110 - \$1,100 per violation⁶; Austere criminal charges commonly enforced against drug traffickers and organized-crime figures are increasingly being enforced by ICE against businesses that employ illegal immigrants⁷; and ICE’s enforcement strategy also includes expanded use of debarments, which prevents employers from participating in future federal contracts and from receiving other government benefits.⁸ ICE enforcement is, and will continue to be, on the rise.⁹

Today, employers without a robust immigration policy are in for a rude awakening when they encounter ICE and ICE’s many counterparts in immigration enforcement. This article illustrates how American employers are increasingly susceptible to ICE civil and criminal penalties (even if they do not employ unauthorized workers) under the Obama Administration and how employers can insulate themselves from such penalties by hiring an external immigration attorney auditor to conduct an immigration compliance audit.

Part I of this paper examines the shift in worksite immigration enforcement from the Bush Administration to the Obama Administration and explains the deputization of “corporate America” in immigration enforcement under the Obama

Administration. It also defines “Corporate America” under the Obama Administration.

Part II of this paper provides a legal overview of the penalties and exemptions afforded to businesses under the Obama Administration. It analyzes the uptick in civil and criminal penalties under the Obama Administration and posits that no employer, no matter its size or industry, is exempt from ICE-initiated audits and penalties.

Part III of this paper discusses how employers can insulate themselves from civil and criminal liability. It proffers that employers must comply with ICE’s IMAGE Best Employment Practices (IBEP) in order to avert liability. It proposes that employers must hire an external immigration attorney auditor to assist with compliance and outlines essential qualities of attorney auditors. It also provides employers with the minimum components of an external attorney-led IBEP compliance audit.

Part IV concludes the paper with a recap of the importance of drafting, implementing, and enforcing a robust immigration compliance policy that parallels ICE’s IBEP.

And finally, Part V provides five appendices. Each appendix provides an overview of an external immigration attorney auditor’s specific responsibilities associated with each audit. As a bonus, Appendix B includes a Form I-9 Audit Checklist.

Information on recent ICE Audits:¹⁰

- Average company fine: \$112,000
- More than 50% of audited companies are fined
- ICE audits have increased tenfold since 2009



Part I – Historical Overview

From Bush to Obama: the Shift in Worksite Immigration Enforcement

Under President George W. Bush relatively few U.S. employers proactively developed or even contemplated adopting a formal corporate immigration compliance policy, seemingly having concluded that such a policy was superfluous. Employers believed that so long as their inventory of I-9s met status quo, and so long as they were not discriminating against potential or current employees, their attention could be focused on other more important and pressing business matters. This carefree approach had a firm grounding in reality. The Bush Administration's immigration enforcement strategy relied on headline-grabbing worksite raids and the arrest of undocumented workers rather than on ferreting out employers in violation of immigration laws.¹¹

Enter the Obama Administration. The Obama Administration's immigration enforcement strategy penalizes corporate America, not the unauthorized alien¹² - that is a major shift from the Bush Administration's worksite enforcement strategy where ICE agents rounded up and deported unauthorized aliens.¹³ And to ferret out and punish employers, the Obama Administration employs tactics paralleling those of a gripping spy novel – the use of confidential informants, body wiretaps, undercover federal agents, cooperating witnesses, statements from former or current employees, and confidential government data, among others.¹⁴ In his first two years in office, President Obama deported nearly 10 percent more illegal immigrants than the Bush administration's 2008 total and 25 percent more than Bush's 2007 total.¹⁵ Further, the pace of full blown company audits roughly quadrupled.¹⁶ The result: stiff civil and criminal penalties levied against employers. While President Obama's new enforcement

strategies require employers to abide by the highly technical rules and regulations that govern immigration compliance, those rules are nothing new.

According to the Immigration Reform and Control Act of 1986¹⁷ (IRCA) and the Immigration Act of 1990¹⁸, employers must verify that employees are authorized to work in the U.S.¹⁹ Verification systems include the Form I-9 and E-Verify program. In both 1986 and 1990, Congress increased and expanded penalties upon employers for knowingly hiring undocumented aliens who are not authorized to work in the U.S.²⁰ “In passing this legislation, Congress was clearly trying to curb the flow of undocumented aliens in the United States by deputizing corporate America to reduce job opportunities for unauthorized aliens.”²¹ Department of Homeland Security (DHS) Assistant Secretary John Morton elaborated on the shift from worksite enforcement to the deputization of corporate America in his testimony in support of the ICE Fiscal Year 2011 budget request before the Senate Appropriations Committee on March 18, 2010:

In April 2009, ICE marked a clear shift in its strategy in enforcing immigration law, by focusing investigations on employers who knowingly hire unauthorized workers and exploit their workforce. Our goal is to foster a culture of compliance by deterring employers from hiring unauthorized workers, penalizing those who violate the law and encouraging employers to use compliance tools, such as E-Verify. By better focusing our efforts, we were able to target employers who hire unauthorized workers for criminal prosecution and civil fines through criminal investigations and by auditing companies' Employment Eligibility Verification forms (Forms I-9).²²



And in 2010, President Obama made it clear that "businesses must be held accountable if they break the law by deliberately hiring and exploiting undocumented workers. We've already begun to step up enforcement against the worst workplace offenders . . . We cannot continue just to look the other way as a significant portion of our economy operates outside the law. It breeds abuse and bad practices. It punishes employers who act responsibly and undercuts American workers. And ultimately, if the demand for undocumented workers falls, the incentive for people to come here illegally will decline as well."²³

The Definition of "Corporate America"

For ICE, corporate America is not limited to major corporations. So what is ICE's limit? In 2010, New China Buffet Restaurant, with only seven employees, was investigated by ICE for employing unauthorized aliens.²⁴ While ICE did not find any unauthorized aliens, it did find seven I-9 "paperwork" violations.²⁵ ICE levied civil penalties against New China Buffet Restaurant at \$935.00 per violation, for a total of \$6,545.00.²⁶ And later that year ICE investigated a Subway franchise restaurant in North Carolina called Snack Attack.²⁷ ICE found no unauthorized aliens, but charged Snack Attack with 108 "paperwork" violations under two counts.²⁸ Count I alleged that Snack Attack hired 11 employees from 2006 – 2009 and failed to have the employees properly fill out section 1 of the Form I-9. Penalties for count I were sought in the amount of \$1,028.50 for each violation, a total of \$11,313.50.²⁹ Count II alleged that Snack Attack hired 97 employees between 2006 – 2009 for whom it failed to prepare or present I-9 forms at all.³⁰ Penalties for count II were sought in the amount of \$99,764.50.³¹ In total, ICE levied penalties of \$111,078.00 against Snack Attack.³² In both these cases, however,

the Administrative Law Judge (ALJ) reduced the penalties levied by ICE.³³ These examples indicate that under the Obama Administration even businesses with as few as seven employees fall into the category of "corporate America." Thus, no business is too small under the Obama Administration's definition of "Corporate America."

Part II – Legal Overview

Civil Penalties

With average civil fines exceeding \$112,000, ICE is gaining the attention of corporate America.³⁴ In her testimony before the House Judiciary Committee in October 2011, DHS Secretary Janet Napolitano reported that since 2009, "ICE has audited more than 6,000 employers suspected of hiring illegal labor, debarred 441 companies and individuals, and imposed more than \$76 million in financial sanctions – more than the total amount of audits and debarments during the entire previous administration."³⁵ In fiscal 2011 alone, ICE conducted 2,496 I-9 audits, up from 503 in 2008.³⁶

Form I-9 potential fines range anywhere from \$110 - \$19,800 per violation.³⁷ Legally, there are five factors that must be given due consideration in assessing appropriate civil violation penalties: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations of the employer.³⁸ The caveat: the law does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors.³⁹ But ICE does have the burden of proof with respect to the penalty as well as to liability.⁴⁰ But that's not a difficult task when there are more than 150 possible mistakes an employer can make on a single, one-page Form I-9⁴¹ and the average company error rate is 35%.⁴² Perhaps that explains why



more than 50% of audited companies are fined.⁴³

Criminal Penalties

“A penalty should be sufficiently meaningful to accomplish the purpose of deterring future violations.”⁴⁴

To complement civil penalties, the Obama Administration rolled out a revised worksite enforcement strategy in early 2009.⁴⁵ The new strategy undergirded the Administration’s commitment to target corporate America. In a written report to the Assistant Director, Deputy Assistant Directors, and Special Agents in Charge of ICE, Marcy M. Forman, Director of the Office of Investigations for ICE, said:

Of the more than 6,000 arrests related to worksite enforcement in 2008, only 135 were of employers. Enforcement efforts focused on employers better target the root causes of illegal immigration. ICE must prioritize the criminal prosecution of the actual employers who knowingly hire illegal workers because such employers are not sufficiently punished or deterred by the arrest of their illegal workforce.⁴⁶

This shift in worksite strategy has been marked by one very significant fact: the media is not reporting the Administration’s worksite enforcement against employers. That means information concerning the Administration’s worksite enforcement strategy is hard to come by. But on January 26, 2010, in a statement given by Kumar Kibble, Deputy Director of ICE, before the House Committee on the Judiciary’s Subcommittee on Immigration Policy and Enforcement, Kibble said:

The success of our approach to worksite enforcement is evident in the statistics. In fiscal year (FY) 2010, ICE . . . criminally arrested 196 employers for worksite-related violations, surpassing the previous high of 135 in FY 2008. We are aware of the concerns raised by some members of this Subcommittee regarding the overall number of administrative arrests pursuant to worksite enforcement operations.⁴⁷

In FY 2011, more than 713 criminal arrests were tied to worksite enforcement investigations.⁴⁸ Those arrested were owners, managers, supervisors and human resources employees.⁴⁹ So what does the Obama Administration have in store for 2012? On September 5, 2012 ICE stated that it “will obtain indictments, criminal arrests or search warrants, or a commitment from a U.S. Attorney’s Office to prosecute the targeted employer before arresting employees for civil immigration violations at a worksite.”⁵⁰

No Penalty Exemptions

The INS conducts well over 60,000 I-9 inspections per year.⁵¹

Today, Congress’ best ally in “curbing the flow of undocumented aliens” is the Obama Administration. Why? Because the Obama Administration has made it clear that “no industry, regardless of size, type or location is exempt from . . . being the subject of an [ICE] investigation.”⁵²

Recently, states like Louisiana, Mississippi, Alabama, Arkansas, and Tennessee have been targets of ICE enforcement.⁵³



Part III - How to Insulate Your Company from Civil and Criminal Penalties

The Answer: Compliance with ICE's IMAGE Best Employment Practices (IBEP)

IMAGE is a voluntary partnership between ICE and private employers designed to combat unlawful employment and reduce vulnerabilities that help illegal immigrants gain employment.⁵⁴

Mira Mdivani, President of the Corporate Immigration Compliance Institute, says "most employers are not hiring unauthorized workers under the table with intention to . . . violate the law. Most businesses find themselves in violation of immigration law because compliance with it has become increasingly complex, confusing, and has the effect of making employers into moving targets for ICE."⁵⁵ So what's the answer? ICE says that employers should use "carefully crafted compliance tools."⁵⁶ Specifically, ICE is referring to its IMAGE Best Employment Practices (IBEP).⁵⁷ ICE Enforcement Unit Chief Brett Dryer stated that "employers who are not signed up for IMAGE should follow as many Best Employment Practices as possible."⁵⁸ So what is on ICE's list of Best Employment Practices?

Employers must:

- Use E-Verify, the DHS employment eligibility verification program, to verify the employment eligibility of all new hires.
- Use the Social Security Number Verification Service (SSNVS) for wage reporting purposes. Make a good faith effort to correct and verify the names and Social Security numbers of the current

workforce and work with employees to resolve any discrepancies.

- Establish a written hiring and employment eligibility verification policy.
- Establish an internal compliance and training program related to the hiring and employment verification process, including completion of Form I-9, how to detect fraudulent use of documents in the verification process, and how to use E-Verify and SSNVS.
- Require the Form I-9 and E-Verify process to be conducted only by individuals who have received appropriate training and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process.
- Arrange for annual Form I-9 audits by an external auditing firm or a trained employee not otherwise involved in the Form I-9 process.
- Establish a procedure to report to ICE credible information of suspected criminal misconduct in the employment eligibility verification process.
- Ensure that contractors and/or subcontractors establish procedures to comply with employment eligibility verification requirements. Encourage contractors and/or subcontractors to incorporate IMAGE Best Practices and when practicable incorporate the use of E-Verify in subcontractor agreements.
- Establish a protocol for responding to letters or other information received from federal and state government agencies indicating that there is a discrepancy between the agency's information and the information provided by the employer or employee (for example, "no match" letters received from the Social Security Administration) and provide employees with an opportunity to make a good faith effort to resolve the discrepancy when it is not due to employer error.
- Establish a tip line mechanism (inbox, email, etc.) for employees to report



activity relating to the employment of unauthorized workers, and a protocol for responding to credible employee tips.

- Establish and maintain appropriate policies, practices and safeguards to ensure that authorized workers are not treated differently with respect to hiring, firing, or recruitment or referral for a fee or during the Form I-9, E-Verify or SSNVS processes because of citizenship status or national origin.
- Maintain copies of any documents accepted as proof of identity and/or employment authorization for all new hires.⁵⁹

Thus, if employers want to insulate themselves from civil and criminal penalties levied by ICE, they should implement as many of the IBEPs as possible.

What Happens When an Employer Fails to Comply with IBEP?

In retrospect, Abercrombie & Fitch (“Abercrombie”) would likely do anything (or pay anything) for a robust immigration compliance program paralleling ICE’s IBEP.⁶⁰ In November 2008, ICE initiated an I-9 audit on an Abercrombie retail store in Michigan after claiming to have “uncovered numerous technology-related deficiencies in Abercrombie’s electronic I-9 verification system.”⁶¹ Eventually, every Abercrombie store in Michigan was audited.⁶² Despite not finding a single unauthorized worker at Abercrombie, and despite Abercrombie’s full cooperation in the ICE investigation, ICE fined Abercrombie \$1,047,110 because of its technical I-9 deficiencies.⁶³

Brian M. Moskowitz, the special agent in charge of the ICE investigation of Abercrombie, stated that “employers are responsible not only for the people they hire but also for the internal systems they choose to utilize to manage their employment process and those systems must result in effective

compliance.”⁶⁴ ICE purports to encourage employers to implement well-crafted compliance tools. What ICE is really saying is this: comply with our demands (IBEP) or face civil and/or criminal penalties if we discover unauthorized workers *or* if your I-9s are not perfect!

“This [\$1,047,110] settlement should serve as a warning to other companies that may not yet take the employment verification process seriously or provide it the attention it warrants.” Brian M. Moskowitz, ICE Special Agent⁶⁵

Why Hire an External Immigration Attorney Auditor to Assist with IBEP Compliance?

Actions taken *before* an ICE-initiated audit or investigation help mitigate damages, reduce exposure, and save the company both time and money in the long-run.⁶⁶ Bottom line: Employers must take steps *now* to ensure full compliance with IBEP or face serious consequences. Immigration compliance is complex, and employers must recognize that even the most well-intentioned internal auditors and/or employees may expose themselves, company executives, and the company itself to civil and criminal liability. That’s why the first – and most important – step toward IBEP compliance is hiring an independent, experienced immigration attorney to conduct a thorough external IBEP immigration compliance audit.



Mitigation of Damages

The expression “mitigation of damages” is frequently used to describe what is more correctly termed “avoiding consequences” or “minimizing damages.”⁶⁷

U.S. employers inherently assume the responsibility to self-direct and internally monitor Form I-9 record-keeping practices and immigration compliance policies.⁶⁸ Human resources departments are generally designated as default Form I-9 and immigration compliance policy gatekeepers. They are charged with the responsibility to review and verify documents for new employees and record and retain Forms I-9. They also draft, disseminate, and enforce immigration compliance policies. And typically, these same employees are assigned the continuing responsibility to self-direct and monitor these practices. The requirements of the Sarbanes-Oxley Act⁶⁹ (SOX) put at risk companies who chose to involve managers and employees in the self-audit process. The weaknesses of this practice may be later exhibited in the employer’s liability exposure. Put simply, “self audits typically result in more difficult situations for the employer than if an audit is done by a qualified, experienced, independent auditor, such as an attorney.”⁷⁰

An independent attorney auditor is experienced in the INA, DHS regulations and policies (including IBEP), Office of the Chief Administrative Hearing Officer Decisions (OACHO)⁷¹ precedent decisions, state-

specific laws, and immigration-related employment laws. The attorney auditor is equipped to effectively evaluate immigration compliance, create proactive protections, and provide attorney-led compliance training (in compliance with IBEP) to human resource departments. As a trained, experienced professional, the attorney auditor can detect and remedy noncompliance, thus mitigating the employer’s damages. The attorney auditor’s goal is to deter litigation altogether – but he must also maintain the employer’s good-faith defense if litigation is necessary.

So how does the attorney auditor mitigate the employer’s damages? The attorney auditor:

- Provides recommendations to the employer as to remediation and mitigation for errors and potential violations;
- Prepares a written report identifying each error and outlines associated corrective procedures in order to correct each error and begin the running of the statute of limitations for paperwork or knowingly employed violations;⁷² and
- Follows up to verify corrections were properly made by the employer.⁷³

By following the attorney auditor’s recommendations, the employer may maintain a good-faith affirmative defense under INA § 274A(b)(6) and 8 U.S.C. § 1324a(b)(6), thus mitigating past damages and protecting itself against future damages.



Table 1⁷⁴

INTERNAL AUDITOR ⁷⁵	EXTERNAL AUDITOR
Is a company's employee	Is an independent contractor
Serves the needs of the company	Serves third parties who need reliable compliance information
Focuses on the future events by evaluating controls designed to assure the accomplishment of entity goals and objectives	Focuses on the accuracy and understandability of historical events
Is independent of the activities audited but is ready to respond to the needs and desires of all elements of management	Is independent of management and the board of directors both in fact and in mental attitude
Is directly concerned with the prevention of noncompliance in any form or extent in any activity reviewed	Is incidentally concerned with the prevention and detection of noncompliance in general, but is directly concerned when compliance may be materially affected
Reviews activities continually	Reviews records supporting compliance – usually once a year

Reduced Exposure

Conducting an external immigration compliance attorney-led audit adds the protection that employers may not be required to disclose information pertaining to exposure uncovered by the audit,⁷⁶ as may be required under SOX⁷⁷ – something that cannot be said for an internal audit. Attorney auditors provide an almost impenetrable layer of insulation to employers who want to avoid being found to have knowingly or intentionally employed an unauthorized worker. Further, attorney auditors can even help protect employers from civil and criminal penalties levied against them for paperwork violations. How? The attorney-client privilege and work product doctrine.

The attorney-client privilege protects discussions where the employer is seeking or obtaining legal assistance from an attorney.⁷⁸ Before an IBEP compliance audit, the attorney auditor and employer enter into a comprehensive audit agreement. Once an agreement is established, the attorney auditor drafts an engagement letter outlining the scope of the audit, includes the terms agreed upon, and inserts specific language as to his engagement by the employer as an “attorney

auditor.” For example, the engagement letter may include an objective statement such as “to devise strategies to address compliance issues regarding federal immigration and related statutes and regulations.”⁷⁹ Thus, when the attorney auditor uncovers violations and subsequently makes recommendations for remediation, those recommendations as to remediation and mitigation for errors and potential violations (as well as effective corrections) are protected under the attorney-client privilege and the employer’s liability exposure is greatly reduced.⁸⁰

The work product doctrine is intended to protect materials prepared by attorneys and their non-attorney assistants “in anticipation of litigation.”⁸¹ The attorney auditor must specify within the terms of the engagement letter that the audit was conducted in preparation of anticipated litigation.⁸² For example, the engagement letter may include a specific statement such as “to address compliance issues regarding federal immigration and related statutes and regulations in anticipation of and preparation for anticipated litigation.” Thus, all correspondence shared by the employer and



attorney auditor, including recommendations for remediation and mitigation, notes from interviews, etc. are protected under the work product doctrine and the employer's liability exposure is greatly reduced.

Employers who hire independent immigration compliance attorney auditors that follow principled auditing standards are afforded an opportunity to claim the attorney-client and work product privileges, something that is not available for employers who engage employee or in-house auditors. And even where violations are found by an attorney auditor, reported to the employer, and subsequently corrected by the employer, that information may not have to be disclosed to ICE or any other government agency based on the attorney-client privilege or work product doctrine, thus greatly reducing the employer's liability exposure.

Time and Money Savings

An ICE audit is initiated via service of a Notice of Inspection (NOI), which compels the employer to produce *all* of its Form I-9s (for the past three years) and supporting documents, including a payroll history, a list of current employees, Articles of Incorporation, and business licenses.⁸³ The employer has 72 hours to produce all these documents.⁸⁴ Failure to provide even one document is a violation for which there is no forgiveness.⁸⁵ With all documents in hand, ICE auditors conduct a thorough compliance inspection.⁸⁶ When violations are found, employers are given ten days to make corrections.⁸⁷ Uncorrected violations are immediately converted into civil fines ranging from \$110 - \$16,000, depending on the violation, and can result in criminal prosecution and/or debarment, meaning "the employer will be prevented from participating in future federal contracts and from receiving other government benefits."⁸⁸ The time and expense (not to mention, the resources) required to gather all the documents for ICE

in 72 hours can be astronomical. And the time and expense to cure all violations within ten days can be as equally astronomical. Hiring an external attorney auditor before an ICE-initiated audit can save the employer time and money.

An attorney auditor prepares employers for ICE-initiated audits. An attorney auditor does not require production of all the employer's documents within 72 hours and does not require that violations be corrected within ten days. On the contrary, the attorney auditor establishes a reasonable timetable for production and correction of all documents with the employer. The attorney auditor then reviews *each* document, cross-checking each with supporting documents, notates all violations individually, and provides the employer with a complete remediation and mitigation strategy for each violation.⁸⁹ The attorney auditor then supervises the employer's remediation efforts so that the employer may maintain its affirmative good-faith defense,⁹⁰ attorney-client privilege, and work product doctrine privilege.⁹¹

Working on the employer's timetable and correcting known violations ahead of an ICE-initiated audit save the employer not only time and money, but from a huge headache. And the cost of an external audit is less than defending (or losing) even one ICE-initiated lawsuit.⁹² In hindsight, how much would Abercrombie, Snack Attack, or New China Buffet be willing to pay for an attorney audit?

Essential Qualities of an External Immigration Attorney Auditor

Independent and Objective

The concepts of independence and objectivity are not only closely related, but are two critical components of an effective external audit.⁹³ According to Government Auditing Standards (GAS) – which ICE employs – the credibility of auditing "is based



on auditors’ objectivity in discharging their professional responsibilities. Objectivity includes independence of mind and appearance when providing audits, maintaining an attitude of impartiality, having intellectual honesty, and being free of conflicts of interest.”⁹⁴ An external auditor is able to work without being influenced by

forces – whether internal or external – that compromise professional judgment.⁹⁵ That independence of mind and appearance allows informed and interested third parties to reasonably conclude that the integrity, objectivity, or professional skepticism of an external audit has not been compromised.⁹⁶

*Table 2⁹⁷

Threats to independence
Self-interest threat – the threat that a financial or other interest will inappropriately influence an auditor’s judgment or behavior;
Self-review threat – the threat that an auditor or audit organization that has provided nonaudit services will not appropriately evaluate the results of previous judgments made or services performed as part of the nonaudit services when forming a judgment significant to an audit;
Bias threat – the threat that an auditor will, as a result of political, ideological, or other convictions, take a position that is not objective;
Familiarity threat – the threat that aspects of a relationship with management or personnel of an audited entity, such as a close or long relationship, or that of an immediate or close family member, will lead an auditor to take a position that is not objective;
Undue influence threat – the threat that external influences or pressures will impact an auditor’s ability to make independent and objective judgments;
Management participation threat – the threat that results from an auditor’s taking on the role of management or otherwise performing management functions on behalf of the entity undergoing an audit; and
Structural threat – the threat that an auditor’s placement within an organization, in combination with the structure of the company being audited, will impact the auditor’s ability to perform work and report results objectively.

*“Circumstances that result in a threat to independence in one of the above [table 2] categories may result in other threats as well. For example, a circumstance resulting in a structural threat to independence may also expose auditors to undue influence and management participation threats.” GAGAS § 3.15.

Competent and Experienced

Competence represents “the *totality* of knowledge, skills, attributes, behaviors and attitudes, as well as, the ability to orchestrate these competencies into the full range of activities necessary for professional practice.”⁹⁸ Immigration compliance attorney auditors are licensed attorneys who have been specifically trained or have experience in immigration compliance law.⁹⁹ They demonstrate a continuing commitment to

learning and development.¹⁰⁰ Such learning and development breeds real-time knowledge of and a level of expertise in complex federal immigration laws and regulations as well as associated employment laws. That knowledge and expertise allows attorneys to effectively gather relevant information and evidence and objectively evaluate the sufficiency and appropriateness of it in relation to immigration compliance risk and control and make sound professional judgments.¹⁰¹



Minimum Components of an External Attorney-Led IBEP Compliance Audit

An attorney-led IBEP compliance audit consists of, at minimum, a full-scope Form I-9 audit, compliance program audit, liability audit, and an anti-discrimination and URIEP audit.¹⁰²

*The Form I-9 Audit*¹⁰³

Form I-9 external audits determine the employer's compliance with the employment authorization verification and attestation and retention requirements of the INA, DHS regulations and policy, and OCAHO precedent decisions.¹⁰⁴ The attorney auditor reviews the employer's I-9s and determines whether they contain substantive¹⁰⁵ or technical and procedural¹⁰⁶ errors and/or evidence of knowingly hired¹⁰⁷ or knowingly continuing to employ¹⁰⁸ charges. The attorney auditor cross-checks the employer's I-9s against reference documents, including a complete current payroll spreadsheet list, a list of terminated employees, offer letters, employment interview forms, etc.¹⁰⁹ The attorney auditor also checks for missing¹¹⁰ or questionable Forms I-9.

Rather than conduct a statistical sampling of error in a group of I-9s, which does not serve the objective of audited employer compliance, the auditor reviews *each* Form I-9 and provides the employer with a complete employer remediation and mitigation strategy.¹¹¹ The employer's corrective actions to cure deficiencies – including paperwork violations – in advance of an ICE investigation allows the employer to exercise the general statutory good-faith defense¹¹² recognized by OCAHO decisions. The attorney auditor supervises the employer's remediation efforts.¹¹³ And finally, the attorney auditor makes determinations as to the running of the statute of limitations for

paperwork violations,¹¹⁴ timeliness violations (from the second and fourth day of employment),¹¹⁵ and knowingly hiring or continuing employment violations.¹¹⁶

*The Compliance Program Audit*¹¹⁷

Compliance program audits determine whether the employer's immigration compliance policies and procedures, compliance manuals, and compliance training programs comply with applicable statutes, agency regulations, policies, and case law.¹¹⁸ Programs are measured in regards to: liability of Form I-9 verification, retention, and storage, anti-discrimination and unfair immigration-related employment practices, and actual and constructive knowledge of contractor and subcontractor use of unauthorized labor.¹¹⁹ The attorney auditor notes deficiencies in the employer's program(s) and provides recommendations for correction and mitigation of potential noncompliance violations and best compliance practices, including IBEP.¹²⁰

An attorney auditor verifies that the employer's programs meet minimum requirements. For example, every employer should have the following:

- Immigration compliance policies and procedures;
- Compliance manuals or handbooks; and
- A compliance training program.¹²¹

Employers who fail to meet minimum standards are provided a detailed auditor's report recommending procedures for establishing and/or improving the employer's compliance program(s).¹²²



The Liability Audit¹²³

The liability audit assesses an employer's civil and criminal penalty liability for violations of statutes and agency regulations as well as liability under anti-discrimination and unfair immigration-related employment and practices laws.¹²⁴ The attorney auditor determines if favorable or adverse factors will affect the mitigation of penalties and whether the statute of limitations has run on past failures.¹²⁵ The liability audit includes an assessment of liability for violations of the following laws:

- H-1B Labor Condition Application (LCA) dependency status and public access requirements;
- Permanent labor certification retention rules;
- FAR E-Verify rules for certain government contractors and subcontractors;
- Sanction violations involving constructive knowledge including contractor and subcontractor knowledge liability;
- Past and current government enforcement actions and notices;
- The employer's potential exposure for government worksite enforcement actions; and
- Pending or potential anti-discrimination or unfair immigration-related employment laws.¹²⁶

The attorney auditor provides the employer with an overview of potential civil and criminal liabilities and a thorough step-by-step remediation plan.

The Anti-Discrimination (AD) and Unfair Immigration-Related Employment Practices (UIREP) Audit¹²⁷

The AD and UIREP audit determines whether the employer's compliance policies and procedures, compliance manuals, and compliance training programs comply with applicable statutes, agency regulations, and written policies.¹²⁸ The attorney auditor determines whether the employer is in compliance with the INA's AD and UIREP provisions, document abuse provisions, Title VII of the Civil Rights Act of 1964 (Title VII),¹²⁹ and other related laws that might warrant sanctions if violated.¹³⁰ The auditor provides the employer with information regarding the range of potential AD and UIREP liability and a remediation plan to correct problems and mitigate potential sanctions under the penalty provisions of the INA.¹³¹

Conclusion

With criminal prosecution and monetary penalization of employers for noncompliance with immigration-related laws reaching record-breaking levels and continuing to rise, now, more than ever, it is imperative that employers draft, implement, and enforce a robust immigration compliance policy paralleling ICE's IBEP. In their compliance efforts, employers have an ally: external immigration attorney auditors. Trained in the multiplicity of applicable state and federal immigration and employment laws, external immigration attorney auditors can provide independent, competent legal advice on strategies to insulate an employer from ongoing liability for past I-9 or immigration-related errors and help the employer properly structure adequate internal compliance and training programs paralleling ICE's IBEP going forward.



Appendix A

An Overview of the Form I-9 Audit¹³²

Auditors must:

- A) Determine if each one of the I-9s is properly retained;¹³³
- B) Determine whether the retained I-9s contain substantive or technical and procedural errors¹³⁴ and evidence of knowingly hired¹³⁵ or knowingly continuing to employ charges;¹³⁶
- C) Cross-check the I-9 forms against reference documents,¹³⁷ including payroll records and related employment records, to make an assessment of missing or questionable I-9 forms;¹³⁸
- D) Recommend remediation plans for I-9 errors to maintain the employer's good-faith affirmative defense against knowingly hired charges;¹³⁹
- E) Make specific recommendations for the employer to correct deficient I-9s, including instructions as to the conduct of tardy verifications for missing I-9s;¹⁴⁰
- F) Provide supervision over the employer's remediation efforts;¹⁴¹
- G) Consider whether additional objectives should be included in the I-9 external audit, such as:
 - (1) Including ICE IMAGE program membership compliance;¹⁴²
 - (2) FAR government contractor or subcontractor compliance;¹⁴³
 - (3) Electronic I-9 retention;¹⁴⁴
 - (4) Compliance with state immigration-related employment laws;¹⁴⁵
 - (5) Conformance with the conditions of past enforcement and/or judicial orders or agreements;¹⁴⁶ and
 - (6) Public company disclosure of potential I-9 enforcement liability on a financial statement under Sarbanes-Oxley or under the CEO liability reporting provisions in the Dodd-Frank Act.¹⁴⁷



Appendix B

The Form I-9 Audit Checklist¹⁴⁸

	Reference	Technical and Substantive Issues
Section 1 Employee Failures	Substantive	<input type="checkbox"/> S1 No I-9 prepared or presented
		<input type="checkbox"/> S1a No employee printed name
		<input type="checkbox"/> S1b No box checked indicating status citizen, national, permanent resident, or alien authorized to work until a specified date or checking multiple boxes
		<input type="checkbox"/> S1c No "A" number next to the phrase "A Lawful Permanent Resident" (but only if this number is not provided in Sections 2 or 3 of the form, or in a legible copy of a document presented for inspection and retained with the form)
		<input type="checkbox"/> S1d No "A" number next to the phrase "An alien authorized to work until," but only if this number is not provided in Sections 2 or 3 of the form, or in a legible copy of a document presented for inspection and retained with the form
		<input type="checkbox"/> S1e No employee attestation signature
	Technical	<input type="checkbox"/> T1 Use of Spanish version I-9 (except in Puerto Rico)
		<input type="checkbox"/> T1a No employee; maiden name <input type="checkbox"/> ; address <input type="checkbox"/> ; birth date <input type="checkbox"/>
		<input type="checkbox"/> T1b No A number next to the phrase, "A lawful Permanent Resident" where A number is in Sections 2 or 3 of the I-9, or on a document retained on the Form I-9 and presented at the I-9 inspection
		<input type="checkbox"/> T1c No alien or admission number next to the phrase, "An alien authorized to work until" when Alien or Admission number is in Sections 2 or 3 of the I-9, or on a document retained on the Form I-9 and presented at the I-9 inspection
		<input type="checkbox"/> T1d No employee attestation date
		<input type="checkbox"/> T1e Failure to ensure individual dates Section 1 at the time employment begins (on or after 9/30/96)
		<input type="checkbox"/> T1f No preparer and/or translator; name <input type="checkbox"/> ; address <input type="checkbox"/> ; signature <input type="checkbox"/> ; or date <input type="checkbox"/>
Section 2 Employer Failures	Substantive	<input type="checkbox"/> S2a Failure to review/verify proper list A document OR list B AND list C documents
		<input type="checkbox"/> S2b Failure to provide the title, identification number, and/or expiration date of list A document or list B AND list C document (unless a legible copy of this document is retained and presented)
		<input type="checkbox"/> S2c Failure of employer or authorized representative to print name in attestation
		<input type="checkbox"/> S2d Failure to sign the attestation
		<input type="checkbox"/> S2e Failure to reverify and complete Section 2 within 90 days for receipt for lost or stolen documents
	Technical	<input type="checkbox"/> T2a No document title, ID number, or expiration date of List A, B, or C document where copy of documents(s) is retained with the Form I-9 and presented at the I-9 inspection
		<input type="checkbox"/> T2b No business title <input type="checkbox"/> ; name <input type="checkbox"/> ; address <input type="checkbox"/>
		<input type="checkbox"/> T2c No date of hire



		<input type="checkbox"/> T2d	No employer attestation date
		<input type="checkbox"/> T2e	Failure to date Section 2 of the Form I-9 within three business days after the date the individual begins employment or, if the individual is employed for three business days or less, at the time employment begins (on or after 9/30/96)
		<input type="checkbox"/> T2f	Failure to state “Special Placement” in column B for such employees using only a list C document
		<input type="checkbox"/> T2g	Failure to state “Special Placement” in column B for employees with a disability using only a list C document
Section 3 Reverification	Substantive	<input type="checkbox"/> S3a	Failure to review proper list A document OR a proper list B AND list C document
		<input type="checkbox"/> S3b	Failure to review/verify the title, ID number, and/or expiration date of list A document or a list B AND a list C document (unless a legible copy of this document or documents is presented for inspection and is retained with the form)
		<input type="checkbox"/> S3c	Failure to sign
		<input type="checkbox"/> S3d	Failure to date
		<input type="checkbox"/> S3e	Failure to date Section 3 of the Form I-9 not later than the date that the work authorization of the individual hired or recruited or referred for a fee expires
	Technical I	<input type="checkbox"/> T3a	No document title, ID number, or expiration date of a list A, B, or C document where a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection
		<input type="checkbox"/> T3b	No date of rehire



Appendix C

An Overview of the Compliance Program Audit¹⁴⁹

Auditors must:

1. Verify that the employer has a compliance program that includes the following:
 - (1) Compliance policies and procedures¹⁵⁰
 - (2) Compliance manuals or handbooks¹⁵¹
 - (3) Compliance training program¹⁵²
2. Verify if the employer has a written compliance policy and procedure manual or handbook that addresses Form I-9 verification and maintenance, discrimination issues, and compliance requirements.¹⁵³
3. Verify if the employer's compliance manuals and handbooks contain content that comply with current federal and state statutes, regulations, and agency policy.¹⁵⁴
4. Evaluate the employer's compliance training program for its effectiveness in the areas of Form I-9 verification, retention, and storage; internal control requirements; anti-discrimination, and actual constructive knowledge of contractors' and subcontractors' use of unauthorized workers.¹⁵⁵
 - A. Determine whether all compliance personnel, managers, supervisors, and other staff involved in immigration-related hiring are given appropriate training so as to ensure compliance with relevant statutes, regulations, and agency policies.¹⁵⁶
- B. Provide a compliance report and articulate the compliance program deficiencies and produce recommendations for correction and mitigation of potential noncompliance violations and best compliance practices.¹⁵⁷



Appendix D

An Overview of the Liability Audit¹⁵⁸

Auditors must:

1. Determine whether the employer has:
 - (1) Potential civil or criminal liability¹⁵⁹
 - (2) Liability for violations of the prohibitions against knowingly hiring or continuing to employ unauthorized aliens¹⁶⁰
 - (3) Form I-9 paperwork¹⁶¹
 - (4) Retention file violations¹⁶²
2. Check for:
 - (1) Indemnification violations¹⁶³
 - (2) Compliance violations¹⁶⁴
 - (3) Cease and desist remedial orders¹⁶⁵
 - (4) Debarment¹⁶⁶
3. Review the results to determine if potential liability exists under the applicable statutes, regulations, and Office of the Chief Administrative Hearing Office (OCAHO) cases for violations of knowingly hiring unauthorized foreign workers or violations of continuing to employ unauthorized foreign workers knowing that they are or have become unauthorized to work in the U.S.¹⁶⁷



Appendix E

An Overview of the Anti-Discrimination and UIREP Audit¹⁶⁸

Auditors must:

1. Determine if the employer has violated the prohibited acts under the IRCA and related employment laws that include:
 - (1) Citizenship or immigration status discrimination¹⁶⁹
 - (2) National origin discrimination¹⁷⁰
 - (3) Document abuse through unfair document practices in the I-9 hiring process¹⁷¹
 - (4) Intimidation or retaliation¹⁷²
2. Examine the employer's compliance policies and procedures, compliance manuals, training programs, and implementation to ensure compliance with AD and UIREP.¹⁷³
 - A. Assess potential liabilities, calculate potential penalties, and review mitigating factors or remedial action that may reduce overall sanctions.¹⁷⁴
3. Prepare an AD and UIREP report containing determinations of potential violations, findings, and an evaluation of the employer's existing compliance program and implementation, providing recommendations for corrective actions and improvement of the compliance program.¹⁷⁵



¹ Total word count is 10,375 (6,984 words make up the substance of the paper while 3,391 make up the endnotes).

² Charles M. Miller, *Stanford Professor Calculates \$104 Billion in uncollected immigration penalties*, Homeland Security Compliance Council Blog, available at http://www.council.hscouncil.org/?page_id=31 (Last accessed Oct. 12, 2012).

³ Office of Investigations, U.S. Immigration and Customs Enforcement (ICE), Notice of Inspection, available at <http://www.immigrationsolutions.com/wp-content/uploads/2009/04/ICE-Notice-of-Inspection.pdf> (Last accessed Sept. 11, 2012).

⁴ *Id.*

⁵ "All U.S. employers must complete and retain a Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. On the form, the employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and relate to the individual and record the document information on the Form I-9. The list of acceptable documents can be found on the last page of the form." I-9, Employment Eligibility Verification, U.S. Citizenship and Immigration Services, available at <http://www.uscis.gov/files/form/i-9.pdf> (Last accessed Oct. 12, 2012).

⁶ Carrie Shmeck, *What to Know About Immigration*, QSR (September 11, 2012) available at <http://www.qsrmagazine.com/human-resources/what-know-about-immigration> (Last accessed Sept. 11, 2012); Jennifer Hermansky, *ICE Releases its I-9 Inspection Overview and New Civil Penalties Schedule*, Klasko (Nov. 24, 2009) available at <http://blog.klaskolaw.com/2009/11/24/ice-releases-its-i-9-inspection-overview-and-new-civil-penalties-schedule/> (Last accessed Sept. 12, 2012).

⁷ See Eric Rich, *Immigration Enforcement's Shift in the Workplace: Case of Md. Restaurateurs Reflects Use of Criminal Investigations, Rather Than Fines, Against Employers*, WASH. POST, Apr. 16, 2006.

⁸ Ann Cunn, *Industrial Strength Immigration Compliance Auditing with Attorney Charles Miller*, The I-9 and E-Verify Blog (Aug. 14, 2012) available at <http://www.lawlogix.com/electronic-i9/compliance-measures/industrial-strength-immigration-compliance-auditing/> (Last accessed Sept. 12, 2012).

⁹ Allen Smith, *I-9 Audits on the Rise in Obama Administration*, Society for Human Resource Management (Jan. 11, 2011) available at <http://www.shrm.org/LegalIssues/FederalResources/Pages/I9AuditsObamaAdministration.aspx> (Last accessed Sept. 12, 2012).

¹⁰ Professional Screening & Information, Inc. "Electronic I9 and E-Verify." White paper. <http://www.psibackgroundcheck.com/electronic-i9-service.shtml>. 24 March 2011.

¹¹ See, Angelo A. Paparelli and Ted J. Chiappari, "Homeland's Outsourcing of Enforcement Gains Impetus," *New York Law Journal*, Immigration Column, (Oct. 22, 2007) at 6 n. 4 ("[A]dministrative law judges in the Office of the Chief Administrative Hearing Officer . . . who hear civil immigration violations involving illegal employment are about as busy as the Maytag repairman. . . . [O]f the 66 published OCAHO decisions from 2000 to 2007, only two involved unlawful employment of aliens"). OCAHO cases from 2000 to 2007 can be found at: www.usdoj.gov/eoir/OcahoMain/publisheddecisions/Looseleaf/Volume9/vol9listforInternet.htm.

¹² Jason Buch, *Sushi Zushi hopes to reopen next week*, My SA (Aug. 1, 2012) available at http://www.mysanantonio.com/news/local_news/article/Sushi-Zushi-hopes-to-reopen-next-week-3750183.php (Last accessed Sept. 12, 2012).

¹³ Daphne Eviatar, *Immigration Raid Rules Echo Bush Era*, The Washington Independent (May 6, 2009) available at <http://washingtonindependent.com/41963/immigration-raid-rules-echo-bush-era> (Last accessed Sept. 12, 2012).

¹⁴ Josie Gonzalez, *The Dynamics of an ICE Raid*, Gonzalez & Harris, available at <http://shusterman.com/pdf/dynamicsofaniceraid.pdf> (Last accessed Oct. 5, 2012).

¹⁵ Peter Slevin, *Deportation of illegal immigrants increases under Obama administration*, The Washington Post (Monday, July 26, 2010) available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072501790.html?hpid=topnews> (Last accessed Oct. 4, 2012).

¹⁶ *Id.*

¹⁷ Immigration Reform and Control Act of 1986, 99 P.L. 203 (November 6, 1986).

¹⁸ Immigration Act of 1990, 101 P.L. 649, (November 29, 1990).

¹⁹ 8 U.S.C. § 1324a(b)(1)(A) (2000) ("The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining [certain specified categories of documents].")

²⁰ 8 U.S.C. § 1324a(e)(5) (2006) ("A respondent determined . . . to have failed to comply with the employment verification requirements as set forth in § 274a.2(b), shall be subject to a civil penalty in an amount not less than . . . \$110 and not more than \$1,100 for each individual with respect to whom such violation occurred on or after September 29, 1999.")



²¹ Thomas C. Green and Ileana M. Ciobanu, *Deputizing – and then Prosecuting – America’s Businesses in the Fight Against Illegal Immigration*, 43 Am. Crim. L. Rev. 1203, 1206 (2006); See, e.g., *Steiben v. INS*, 932 F.2d 1225, 1227 (8th Cir. 1991) (“In an effort to deter illegal immigration, Congress designed . . . § 1324a to control the unlawful employment of aliens in the [U.S.] by subjecting persons or entities who hire unauthorized aliens to civil and criminal penalties.”); *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1998) (“Congress enacted the [Act] to reduce illegal immigration by eliminating employers’ economic incentive to hire undocumented aliens. To achieve this objective the [Act] imposes an escalating series of sanctions on employers who hire such workers.”).

²² Testimony of Department of Homeland Security Assistant Secretary John Morton Before the Senate Appropriations Committee on the U.S. Immigration and Customs Enforcement Fiscal Year 2011 Budget Request, available at http://www.dhs.gov/ynews/testimony/testimony_1271443011074.shtm (March 18, 2010).

²³ President Obama, speech given at the American University’s School of International Service in Washington, DC on Comprehensive Immigration Reform (July 1, 2010).

²⁴ *United States v. New China Buffet Restaurant*, 2010 OCAHO LEXIS2(May 27, 2010).

²⁵ *Id.* at 1.

²⁶ *Id.* at 5.

²⁷ *United States v. Snack Attack Deli, Inc. D/B/A, Subway Restaurant # 3718*, 2010 OCAHO LEXIS 6 (December 22, 2010).

²⁸ *Id.* at 2.

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 32; *New China Buffet Restaurant* at 17.

³⁴ Professional Screening & Information, Inc. “Electronic I9 and E-Verify.” White paper. <http://www.psibackgroundcheck.com/electronic-i9-service.shtml>. 24 March 2011.

³⁵ Department of Homeland Security, Testimony of Secretary Janet Napolitano before the United States House of Representatives Committee on the Judiciary, October 25, 2011, available at <http://www.dhs.gov/news/2011/10/25/testimony-secretary-janet-napolitano-united-states-house-representatives-committee> (Last accessed 8/23/2012).

³⁶ Kirsten Meyer, *2012 Update on ICE I-9 Audits: No Relief for Employers*, Employment Tax Specialists, April 9, 2012, available at <http://www.employmenttax.com/blog/bid/123190/2012-Update-on-ICE-I-9-Audits-No-Relief-for-Employers> (Last accessed 8/23/2012).

³⁷ 8 C.F.R. § 274a.10(b)(2) (2006). See also, Carrie Shmeck, *What to Know About Immigration*, QSR (September 11, 2012) available at <http://www.qsrmagazine.com/human-resources/what-know-about-immigration> (Last accessed Sept. 11, 2012); Jennifer Hermansky, *ICE Releases its I-9 Inspection Overview and New Civil Penalties Schedule*, Klasko (Nov. 24, 2009) available at <http://blog.klaskolaw.com/2009/11/24/ice-releases-its-i-9-inspection-overview-and-new-civil-penalties-schedule/> (Last accessed Sept. 12, 2012).

³⁸ 8 U.S.C. § 1324a(e)(5) (2006).

³⁹ *United States v. Hernandez*, 8 OCAHO no. 1043, 660,664 (2000).

⁴⁰ *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996).

⁴¹ Carrie Shmeck, *What to Know About Immigration*, QSR (September 11, 2012) available at <http://www.qsrmagazine.com/human-resources/what-know-about-immigration> (Last accessed Sept. 11, 2012). On November 25, 2009 ICE notified Alyn Industries it had committed 62 Form I-9 “paperwork” violations. ICE’s Notice of Intent to Fine (NIF) sought penalties in the amount of \$1,028.50 for each violation, for a total of \$63,767.00. *United States v. Alyn Industries, Inc.*, 10 OCAHO no. 1141 (August 17, 2011).

⁴² Professional Screening & Information, Inc. “Electronic I9 and E-Verify.” White paper. <http://www.psibackgroundcheck.com/electronic-i9-service.shtml>. 24 March 2011.

⁴³ *Id.* See also John Fay, *Dealing with Skeletons in the Closet, Part II: Errors, omissions, and inconsistencies on the I-9 Form*, The I-9 and E-Verify Blog (October 31, 2011), available at <http://www.lawlogix.com/electronic-i9/enforcement/dealing-with-skeletons-in-the-closet-part-ii-errors-omissions-and-inconsistencies-on-the-i-9-form/> (Last accessed Oct. 10, 2012).

⁴⁴ *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998).

⁴⁵ Fact Sheet: Worksite Enforcement, U.S. Immigration & Customs Enforcement (Apr. 30, 2009) available at www.ice.gov/news/library/factsheets/worksite.htm (Last accessed Sept. 13, 2012).

⁴⁶ Memorandum, Marcy M. Forman, Worksite Enforcement Strategy, ICE Director of Investigations (April 30, 2009) available at http://www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf (Last accessed Sept. 13, 2012).



- ⁴⁷ Testimony of ICE Deputy Director Kumar Kimble in front of the House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement (January 26, 2010) *available at* <http://www.ice.gov/doclib/news/library/speeches/012611kibble.pdf> (Last accessed Sept. 13, 2012).
- ⁴⁸ Fact Sheet: Worksite Enforcement, U.S. Immigration & Customs Enforcement (May 23, 2012) *available at* <http://www.ice.gov/news/library/factsheets/worksite.htm> (Last accessed Sept. 13, 2012).
- ⁴⁹ *Id.*
- ⁵⁰ Worksite Enforcement, U.S. Immigration & Customs Enforcement (Sept. 5, 2012) *available at* <http://www.ice.gov/worksite/> (Last accessed Sept. 13, 2012).
- ⁵¹ Carl Shusterman, *Immigration Laws Place Employers on the Defense: A Delicate Balancing Act is Required*, National Law Journal (1995) *available at* <http://shusterman.com/i9sanctionsforemployers.html> (Last accessed Oct. 17, 2012) [hereinafter *Delicate Balancing Act*].
- ⁵² *Id.* at Fact Sheet: Worksite Enforcement (May 23, 2012).
- ⁵³ ICE News Release (March 2, 2010), *available at* <http://www.ice.gov/news/releases/1003/100302neworleans.htm> (Last accessed Sept. 12, 2012).
- ⁵⁴ ICE, IMAGE Certification and and Program, *available at* <http://www.ice.gov/image/> (Last accessed Aug. 25, 2012).
- ⁵⁵ Mira Mdivani Pat Mack, *Employer Prosecutions Triggered by Allegations of Immigration Law Violations: Legitimate Law Enforcement or a Misguided Policy Tool?*, 19 UMKC L. Rev. 827, 838 (2011).
- ⁵⁶ Memorandum from Marcy Forman on ICE Worksite Enforcement Strategy (Apr. 30, 2009).
- ⁵⁷ IMAGE Best Hiring Practices, U.S. Immigr. & Customs Enforcement, *available at* <http://www.ice.gov/image/best-practice.htm> (Last accessed Oct. 19, 2012) [hereinafter *Best Practices*].
- ⁵⁸ Mira Mdivani, ICE Worksite Enforcement Chief: We Are Going After Employers; ICE Best Practices Right on the Money, I-9 Seminars, Jul. 2, 2010, *available at* <http://www.i-9seminars.com/index.php/articles/1846.html> (Last accessed Oct. 19, 2012).
- ⁵⁹ *Id.* at *Best Practices*.
- ⁶⁰ *Id.*
- ⁶¹ *Id.*
- ⁶² *Id.*
- ⁶³ *Id.*
- ⁶⁴ *Id.*
- ⁶⁵ Press Release, U.S. Immigration & Customs Enforcement, Abercrombie and Fitch Fined After I-9 Audit (Sep. 28, 2010), *available at* <http://www.ice.gov/news/releases/1009/100928detroit.htm> (Last accessed Oct. 19, 2012).
- ⁶⁶ Mahsa Aliaskari, *Targeting Employers: Workplace Enforcement and the Culture of Compliance*, 2010 Emerging Issues 5214 (July 21, 2010).
- ⁶⁷ Caprice L. Roberts, *The Fifth Remedies Discussion Forum: Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 Loy. L.A. L. Rev. 131, 141 (Fall, 2008).
- ⁶⁸ Charles M. Miller, *E-Verify Self-Assessment: The Beginning of an "Industrial Strength"*, Audited Immigration Compliance Program, Homeland Security Compliance Council Compliance Blog.
- ⁶⁹ *Sarbanes-Oxley Act*, Pub. L. No. 107-204, 116 Stat. 745 (2002).
- ⁷⁰ Charles Kuck, *Why A Company Should Not Self-Audit its Own Forms I-9*, HR.com (Jan. 5, 2011) *available at* <http://www.hr.com/en/app/blog/2011/01/why-a-company-should-not-self-audit-its-own-forms-gikajla4.html> (Last accessed Sept. 17, 2012).
- ⁷¹ Department of Justice, Office of the Chief Administrative Hearing Officer, *available at* <http://www.justice.gov/coir/OcahoMain/ocahosibpage.htm> (Last accessed Sept. 18, 2012).
- ⁷² "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the U.S. in order that proper service may be made thereon." 8 U.S.C. § 2462. See *Curran Engineering*, 7 OACHO 975 (1997); *Ojeil*, 7 OACHO 984 (Jan. 12, 1998); *WSC Plumbing*, 9 OACHO 1062 (Nov. 29, 2000), and 9 OACHO 1071 (June 4, 2001).
- ⁷³ *Auditing for Lawyers* at 5.04.
- ⁷⁴ Lawrence B. Sawyer, Mortimer A. Dittenhofer, and James H. Scheiner, *Sawyer's Internal Auditing*, 5th Edition, pg 7-8.
- ⁷⁵ "With experience, [internal auditors'] judgments become more consistent with [employer] interests and auditors voluntarily become advocates for their employer rather than watchdogs." Robert A. Prentice, *The SEC and MDP: Implications of the Self-Serving Bias for Independent Auditing*, 61 Ohio St. L.J. 1597, 1603 (2000). Even trained scientists are subject to the self-serving bias. It often affects physicists' interpretations of their experimental results and for that reason physicists are starting to use double-blind testing to minimize the effects of the bias. See James Glanz, *New Tactics in*



Physics: Hiding the Answer, N.Y. Times, Aug. 4, 2000, at D1 ("The problem is, physicists' natural eagerness to find new effects may lead them, in all innocence, to parse the data or make the comparisons in slightly biased fashion if they can see the answer as they work."). See also James Shepperd, Wendi Malone, and Kate Sweeny, *Exploring Causes of the Self-Serving Bias*, *Social and Personality Psychology Compass* 2/2, 895-908, University of Florida, (2008) available at <http://www.psych.ufl.edu/~shepperd/articles/SSB2008.pdf> (Last accessed Oct. 10, 2012).

⁷⁶ Attorney auditors may assert an attorney-client privilege or "good faith" affirmative defense on behalf of an employer. See INA § 274A(a)(1)(A), 8 U.S.C. § 1324a(1)(A); INS § 274A(a)(2), 8 U.S.C. § 1324a(a)(2).

⁷⁷ *Id.* at § 301.

⁷⁸ *Fisher v. United States*, 425 U.S. 391, 403 (1976).

⁷⁹ *In re Grand Jury (Attorney-Client Privilege)*, 527 F.3d 200 (D.C. Cir. 2008)(applying attorney-client privilege to a document a client transfers to his attorney for the purpose of obtaining legal advice).

⁸⁰ *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336 (1915)(assuming that the privilege applies when the client is a corporation).

⁸¹ *United States v. Nobels*, 422 U.S. 225, 238-39 (1975).

⁸² *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁸³ Form I-9 Inspection Overview, Worksite Enforcement Unit, Office of Investigations, Immigration and Customs Enforcement, November 19, 2009, available at http://www.ice.gov/doclib/foia/dro_policy_memos/formi9inspectionoverview.pdf (Last accessed Nov. 12, 2012).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Seyfarth Shaw, Attorneys, *When Internal I-9 Audits Are Just Not Enough – A Turnkey Immigration Compliance Solution*, Immigration Compliance Center of Excellence, available at http://www.seyfarth.com/dir_docs/publications/ImmigrationComplianceCenter.pdf (Last accessed Oct. 17, 2012).

⁹⁰ INA § 1274(a)(3), 8 U.S.C. § 1324a(a)(3).

⁹¹ *Id.* at *Fisher*, 425 U.S. 391, 403 (1976).

⁹² "The average company fine is \$112,000." Professional Screening & Information, Inc. "Electronic I9 and E-Verify." White paper. <http://www.psibackgroundcheck.com/electronic-i9-service.shtml>. 24 March 2011.

⁹³ ViewPoints, *Evaluating the audit and the external auditor*, Audit Committee Leadership Network in North America, Issue 37: August 7, 2012, available at [http://www.ey.com/Publication/vwLUAssets/Viewpoints_37_-_August_2012_-_Evaluating_the_audit_and_the_external_auditor/\\$FILE/Viewpoints%2037%20-%20August%202012%20-%20Evaluating%20the%20audit%20and%20the%20external%20auditor%20-%20CJ0199.pdf](http://www.ey.com/Publication/vwLUAssets/Viewpoints_37_-_August_2012_-_Evaluating_the_audit_and_the_external_auditor/$FILE/Viewpoints%2037%20-%20August%202012%20-%20Evaluating%20the%20audit%20and%20the%20external%20auditor%20-%20CJ0199.pdf) (Last accessed Oct. 12, 2012).

⁹⁴ GAO-12-331G, Government Auditing Standards § 1.19 (December 2011) [hereinafter *GAGAS*].

⁹⁵ *GAGAS* § 3.03(a).

⁹⁶ *GAGAS* § 3.03(b).

⁹⁷ *GAGAS* § § 3.14(a)-(g)

⁹⁸ American Academy of Physician Assistants, Professional Competence, Adopted 1996, amended 2005 and 2010, available at <http://www.aapa.org/uploadedFiles/content/Common/Files/14-ProfCompetence.pdf> (Last accessed Oct. 17, 2012).

⁹⁹ Information Systems Audit and Control Association (ISACA), IS Auditing Guideline Competence, Document G30, 2.2.1 (2005) [hereinafter *ISACA*].

¹⁰⁰ *GAGAS* § 3.42.

¹⁰¹ *Id.*; *ISACA* at 2.2.5.

¹⁰² Charles M. Miller, Marcine A. Seid, and S. Christopher Stowe, Jr., *Immigration Compliance Auditing for Lawyers*, American Bar Association (2012) [hereinafter *Auditing for Lawyers*]. "The American Bar Association's cutting-edge resource book provides authoritative, step-by-step guidance for conducting immigration compliance audits under the Department of Homeland Security regulations and related employment laws." *Id.* at Preface. See also Ann Allott, Daniel M. Kowalski, Edward F. "Ned" Frazier, *Immigration Enforcement: I-9 Compliance Handbook*, Matthew Bender (2011) [hereinafter *I-9 Compliance Handbook*]. ". . . offers easily understood, step-by-step procedures, sample forms and notices, and reference materials to point employers through this difficult area of immigration and employment law."

¹⁰³ *Auditing for Lawyers* at 1.04.2; *I-9 Compliance Handbook* at Chapter 3.

¹⁰⁴ *Auditing for Lawyers* at 1.03; *Delicate Balancing Act*.



¹⁰⁵ *Auditing for Lawyers* at 5.04.2. There is no “good faith” defense to substantive violations and these violations will not be forgiven. ICE issues an Application for Notice of Intent to Fine (NIF)(I-761 Form), for violations, such as:

- Knowingly hiring or continuing to employ unauthorized aliens.
- Failure to timely prepare or present the Form I-9.
- Failure to complete Section 2 of the form in three business days.
- Failure to ensure that the employee checks on of the attestation boxes in Section 1 of the I-9 form indicating their immigration status.
- Failure to provide the date employment begins in the attestation portion of Section 2 of the Form I-9.
- Failure to date Section 2 of the Form I-9.
- Failure to sign Section 3 of the Form I-9.
- Failure to timely correct technical paperwork violations.
- Engaging in fraud in completing Form I-9.
- Continuing to produce violations after previously receiving a Warning Notice or NIF.

¹⁰⁶ *Auditing for Lawyers* at 5.04.2. If technical violations cannot be reasonably corrected, the employer should provide ICE with an explanation in writing of why the violations cannot be reasonably corrected. If ICE determines the explanation is reasonable, the violation is dismissed. Otherwise, ICE enforces penalties. Examples of technical violations are:

- Use of the Spanish version of the Form I-9, except in Puerto Rico.
- Failure to ensure an individual in Section 1 provides a name that reasonably relates to them and the documents being presented, their address, or birth date.
- Failure to ensure an LPR or alien authorized to work provides an alien number (“A” number) in Section 1, but only if the “A” number is provided in Sections 2 or 3 of the form (or on a legible copy of a document retained with the Form I-9 and present at the I-9 inspection).
- Failure to ensure the individual dates Section 1.
- Failure to ensure a preparer and/or translator provide his or her name, address, signature and date.
- Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or a proper List B plus List C document in Sections 2 and 3, but only if a legible copy of the document(s) is retained with the I-9 and presented at the I-9 inspection.
- Failure to provide the title, business name, and address in Section 2.
- Failure to state “Individual under age 18” in Column B for employees under the age of 18 using only a List C document.
- Failure to provide the date of rehire in Section 3.

¹⁰⁷ INA § 274A(a)(1)(A); 8 U.S.C. § 1324a(a)(1)(A).

¹⁰⁸ INA § 274A(a)(2); 8 U.S.C. § 1324a(a)(2).

¹⁰⁹ *Auditing for Lawyers* at 5.02.4.

¹¹⁰ *Auditing for Lawyers* at 5.04.11.

¹¹¹ Seyfarth Shaw, Attorneys, *When Internal I-9 Audits Are Just Not Enough – A Turnkey Immigration Compliance Solution*, Immigration Compliance Center of Excellence, available at http://www.seyfarth.com/dir_docs/publications/ImmigrationComplianceCenter.pdf (Last accessed Oct. 17, 2012).

¹¹² INA § 1274(a)(3), 8 U.S.C. § 1324a(a)(3).

¹¹³ *Auditing for Lawyers* at 5.0.

¹¹⁴ Curran Engineering, 7 OCAHO 975 (Oct. 31, 1997)(running the statute of limitations from the correction of the I-9s or the end of the retention period).

¹¹⁵ *Id.*

¹¹⁶ *Id.* INA § 274 (a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A); INA § 274A(a)(2), 8 U.S.C. § 1324a(a)(2).

¹¹⁷ *Auditing for Lawyers* at 1.04.3.

¹¹⁸ *Id.*

¹¹⁹ *Auditing for Lawyers* at 6.01

¹²⁰ *Id.*

¹²¹ *Auditing for Lawyers* at 6.02.

¹²² *Id.*

¹²³ *Auditing for Lawyers* at 1.04.4.

¹²⁴ *Auditing for Lawyers* at 7.0.

¹²⁵ *Auditing for Lawyers* at 7.0.



- ¹²⁶ Id.
- ¹²⁷ *Auditing for Lawyers* at 1.04.5; *I-9 Compliance Handbook* at 6.01.
- ¹²⁸ Id.
- ¹²⁹ Pub. L. No. 88-352, 78 Stat. 241, enacted July 2, 1964, as amended, 42 U.S.C. § § 2000e *et seq.*
- ¹³⁰ *Auditing for Lawyers* at 8.01.
- ¹³¹ *Auditing for Lawyers* at 8.02.
- ¹³² *Auditing for Lawyers* at 1.04.2; *I-9 Compliance Handbook* at Chapter 3.
- ¹³³ *I-9 Compliance Handbook* at 4.02 and 4.03; *Auditing for Lawyers* at 5.03.20.
- ¹³⁴ *Auditing for Lawyers* at 5.03.3.
- ¹³⁵ INA § 274A(a)(1)(A); 8 U.S.C. § 1324a(a)(1)(A); *Auditing for Lawyers* at 5.03.6; *I-9 Compliance Handbook* at 7.03.
- ¹³⁶ INA § 274A(a)(2); 8 U.S.C. § 1324a(a)(2); *Auditing for Lawyers* at 5.03.6; *I-9 Compliance Handbook* at 7.03.
- ¹³⁷ Loan T. Hyunh, *I-9 Audit Surges Continue: Federal Enforcement Continues to Target the Construction Industry*, Fredrickson & Byron, P.A. (August 2012) available at http://www.fredlaw.com/articles/realstate/real_1208_lth.html (Last accessed Oct. 17, 2012).
- ¹³⁸ *I-9 Compliance Handbook* at 8.03; *Auditing for Lawyers* at 5.02.4 and 5.03.1.
- ¹³⁹ INA § 274A(a)(3); 8 U.S.C. § 1324a(a)(3); *I-9 Compliance Handbook* at 8.02; *Auditing for Lawyers* at 5.03.10.
- ¹⁴⁰ *I-9 Compliance Handbook* at 8.04; *Auditing for Lawyers* at 5.04.2 and 5.04.3; Society for Human Resource Management, *I-9: I-9 Audit Checklist* (Aug. 27, 2010) available at <http://www.shrm.org/TemplatesTools/Samples/HRForms/Articles/Pages/I-9AuditChecklist.aspx> (Last accessed Oct. 17, 2012).
- ¹⁴¹ Id. at *I-9 Compliance Handbook*; Id. at *Auditing for Lawyers*.
- ¹⁴² *Auditing for Lawyers* at 5.03.12 and 7.07.1; Jared Leung, *A New and Improved I-9 IMAGE*, The I-9 and E-Verify Blog (Nov. 15, 2011) available at <http://www.lawlogix.com/electronic-i9/compliance-measures/a-new-and-improved-i-9-image/> (Last accessed Oct. 17, 2012).
- ¹⁴³ *Auditing for Lawyers* at 7.07.2; Bruce Buchanan, *Employers Must Bargain with Union to Voluntarily Implement E-Verify*, E-Verify & I-9 News, available at <http://everifyandi9news.com/2012/05/employers-must-bargain-with-union-to-voluntarily-implement-e-verify/> (Last accessed Oct. 17, 2012).
- ¹⁴⁴ Patrick Hollaran, CPA and Clare E. Cella, CPA, *I-9 Audits Are on the Rise: Prepare For a Close Examination of Your Hiring Records*, The Bottomline (October/November 2011) available at <http://www.odmd.com/cms/files/i9audits%20are%20on%20the%20rise.pdf> (Last accessed Oct. 17, 2012).
- ¹⁴⁵ *Delicate Balancing Act*.
- ¹⁴⁶ Id.
- ¹⁴⁷ Gerald Goulder, *Our I-9 and Employment Eligibility Verification (EEV) Consulting Services*, Goulder Immigration Law Firm, available at <http://www.i-9employmenteligibility.com/services.html> (Last accessed Oct. 17, 2012).
- ¹⁴⁸ *Auditing for Lawyers* at 5.04.10
- ¹⁴⁹ *Auditing for Lawyers* at 1.04.3.
- ¹⁵⁰ *Auditing for Lawyers* at 6.02.1.
- ¹⁵¹ *Auditing for Lawyers* at 6.02.2.
- ¹⁵² *Auditing for Lawyers* at 6.02.3.
- ¹⁵³ Id. at 6.02.1, 6.02.2, and 6.02.3.
- ¹⁵⁴ Id.
- ¹⁵⁵ Id.
- ¹⁵⁶ Id.
- ¹⁵⁷ *Auditing for Lawyers* at 1.04.3.
- ¹⁵⁸ *Auditing for Lawyers* at 1.04.4.
- ¹⁵⁹ *Auditing for Lawyers* at 7.01; *I-9 Compliance Handbook* at 7.02 and 7.05.
- ¹⁶⁰ INA § 274A(a)(1)(A); INA § 274A(a)(2); 8 U.S.C. § 1324a(a)(1)(A); 8 U.S.C. § 1324a(a)(2); *Auditing for Lawyers* at 5.03.6, 7.02, and 7.05.1.1; *I-9 Compliance Handbook* at 7.03.
- ¹⁶¹ *Auditing for Lawyers* at 5.03.3 – 5.03.5, 5.03.10, and 7.05.1.2; *I-9 Compliance Handbook* at Chapter 3.
- ¹⁶² *Auditing for Lawyers* at 5.03.20; *I-9 Compliance Handbook* at 4.01 – 4.03.
- ¹⁶³ *Auditing for Lawyers* at 7.04.
- ¹⁶⁴ *Auditing for Lawyers* at 7.05.4.
- ¹⁶⁵ *Auditing for Lawyers* at 1.04.4.
- ¹⁶⁶ *Auditing for Lawyers* at 7.08.4 and 7.10.10.
- ¹⁶⁷ INA § 274A(a)(1)(A); INA § 274A(a)(2); 8 U.S.C. § 1324a(a)(1)(A); 8 U.S.C. § 1324a(a)(2); *Auditing for Lawyers* at 5.03.6, 7.02, and 7.05.1.1; *I-9 Compliance Handbook* at 7.03.



¹⁶⁸ *Auditing for Lawyers* at 1.04.5; *I-9 Compliance Handbook* at 6.01.

¹⁶⁹ *Auditing for Lawyers* at 8.04.

¹⁷⁰ *Auditing for Lawyers* at 8.05.

¹⁷¹ *Auditing for Lawyers* at 8.06; *I-9 Compliance Handbook* at 6.01.

¹⁷² *Auditing for Lawyers* at 8.07; INA § 274B; 8 U.S.C. § 1324b.

¹⁷³ *Auditing for Lawyers* at 1.04.5; *I-9 Compliance Handbook* at 6.01.

¹⁷⁴ *Auditing for Lawyers* at 1.04.5 and 8.01.

¹⁷⁵ *Auditing for Lawyers* at 1.04.5.