

7 REASONS WHY EMPLOYERS SHOULD CONDUCT AN INTERNAL IMMIGRATION AUDIT

Be prepared for I-9, H-1B & PERM audits, workplace raids, SSA mismatch letters, state and federal contracting, and/or mergers and acquisitions

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An internal audit is one that the employer arranges with counsel to review paperwork, staff training and internal policies in advance of there being any government enforcement action. The purpose of an audit is to establish internal compliance, train key employees about how to prepare, document and retain regulatory paperwork, and to develop plans for response in case of audit or enforcement action. Similarly, engaging immigration counsel to conduct an internal audit during the due diligence process of a merger or acquisition can help to uncover potential liabilities or to strategize immigration status needs for target company employees. Finally, doing an internal audit is prudent before applying for state and federal contracts.

I-9 Audits

As noted in the preceding article, EVERY employer needs to complete I-9 forms for every employee hired after November 4, 1986. DHS/ICE has the right to audit employers' I-9 forms. Completion of the I-9s is a good faith defense to a charge of hiring unauthorized workers. While civil I-9 audits have been in decline over the years because ICE does not find them to be particularly cost-effective, ICE is conducting workplace raids that have the potential for criminal prosecution for related offenses such as identity theft, fraud, smuggling and trafficking in documents, goods or people. I-9s become a critical component of such enforcement action. While the numbers of criminal enforcement actions have been fairly low given the 12 million or so undocumented people living and working in the US, workplace raids can have significant impact on an employer and its workers regardless of status: public relations nightmares, fleeing or arrested workers and loss of work

force, loss of productivity, split up families and related humanitarian issues, and expensive and protracted litigation. Moreover, employers need to know when, as the result of an audit, they are permitted to fire employees so as not to run afoul of anti-discrimination legislation which could lead to law suits by dismissed employees. Therefore, employers should consider hiring counsel to do an internal audit BEFORE ICE comes knocking on the door.

H-1B Audits

The H-1B visa program allows employers to hire foreign workers temporarily who hold degrees in subjects related to the job where the occupation commonly requires a degree. This program is enforced in part by the US Department of Labor (DOL). The employer is required to prepare, post and maintain Labor Condition Applications (LCAs) which document the prevailing wage, the wage offered, and various attestations that the foreign worker will not be breaking a strike, and will receive benefits similar to US workers. The employer is required to have a public inspection file for all employees to view, and DOL is able to audit that inspection file as well as payroll records to make sure the foreign worker was paid the wage stated in the application. This is another area where it makes sense for employers of H-1B workers to hire counsel to review H-1B recordkeeping in case of an audit. In particular, Congress has asked for an investigation of contracting firms that use substantial numbers of the H-1B visas available. While H-1B audits are not that common, the H-1B program is currently undergoing scrutiny. The consequences to an employer for improper record keeping can be back wages to the foreign worker, de-barrment from the employer's participation in the H-1B program, and discrimination claims by US citizens and green card holders, among other penalties.

PERM Audits

PERM is the process by which a US employer sponsors a foreign worker for permanent residence following a very strict recruitment methodology administered by DOL called "labor certification". While PERM has become more of an automated process, employers can be audited based on certain automated triggers depending upon how application questions are answered, by random selection or specific industry investigations, or tips. Employers must be able

to produce within a very limited time period all evidence of recruitment efforts, results of responses by candidates, documentation of business necessity for certain job requirements, and other business or recruitment information. Theoretically, employers should be documenting this information while their PERM applications are being developed and prior to filing PERM applications. But for employers who do not do this, hiring counsel to do an internal audit to make sure all paperwork is available upon a request from DOL is essential to continued participation in the program and successful approval of PERM applications.

Mergers and Acquisitions

When a company contemplates a merger or acquisition, business counsel is usually hired to analyze the liabilities of the target company, its financial status and viability. But often, mergers and acquisitions (M&A) counsel are trained in just business and finance issues and don't realize there may be immigration consequences for the employees they want to keep in the target company. Some foreign workers have a visa status that is employer-dependent. A change in employers or a change in employer ownership configurations or nationality can result in the need for a change or amendment to a visa category. Similarly, some immigrants can lose status altogether if the owners of the new company do not meet certain criteria. This is especially important for E and L visa holders. Many areas of immigration law are subject to "successor in interest" rules of which business M&A counsel may not be aware. Finally, including immigration counsel in this process can help to uncover potential I-9/unauthorized worker liabilities of the target company. Therefore, it is advisable to include immigration counsel during the due diligence process to review all personnel records of the target company for immigration issues, to review the corresponding ownership interests of the prospective new employer and future job duties of foreign workers once the M&A is complete.

Workplace Raids Due to Fugitives

There have been reports that ICE vans loiter outside workplaces when ICE is looking for people that have failed to report for deportation following a court order. This tends to invoke fear among employees who may work with the abscondee. Often employers have no idea their employees have been ordered

deported. Therefore, this is another reason in favor of conducting an internal audit. One person's problem can trigger an entire workforce raid.

Social Security Mismatch Letters

As noted in the preceding article, receiving Social Security Mismatch letters might be a good time to consider an overall internal employee audit of your company, within the bounds of what Social Security and IRCA require.

State and Federal Contracting

Many federal agencies now require I-9 compliance in order to contract with the feds. This becomes a more difficult issue if your company works with subcontractors since there are specific subcontractor rules. Because Congress failed to pass comprehensive immigration reform, a component of which would have addressed employer liabilities, several states have now taken it upon themselves to require I-9 compliance and/or participation in the federal government's E-Verify program in order to contract. This raises a number of legal questions such as federal preemption over immigration law. Whether these state initiatives will withstand legal challenges remains to be seen. Nonetheless, in the interim, companies hoping to receive state contracts may be required to demonstrate I-9 compliance.

In sum, there are at least seven reasons why employers of all kinds of workers may benefit from internal audits before ICE or DOL come knocking or because of a contemplated change in ownership, or desire to contract with the government. The Law Office of Bonnie Stern Wasser can help your company with audit and training services. (206)282-2279. bonnie@bswasserlaw.com