

Before and After the ICE Subpoena Arrives

In 2011, U.S. Immigration and Customs Enforcement and the U.S. Customs and Immigration Service issued thousands of notices of inspection and subpoenas. In 2012, enforcement efforts against employers will intensify, writes Robert F. Loughran.

Robert F. Loughran

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In 2011, U.S. Immigration and Customs Enforcement and the U.S. Customs and Immigration Service issued thousands of notices of inspection and subpoenas. In 2012, enforcement efforts against employers will intensify.

In 2006, ICE created the position of forensic auditor. It greatly expanded their numbers in 2009, providing specialized skills for and adding uniformity to a process that special agents/criminal investigators had handled for the preceding 20 years. The number of permanently staffed ICE forensic auditor positions has grown, as has the number of worksite enforcement special agents. When the government staffs up to this degree, the level of enforcement rises with an internal momentum that should last for years.

Given this continuing immigration enforcement focus, in-house counsel need to ensure that their companies comply with the myriad of immigration laws and regulations. It's helpful to break efforts up in the time before a subpoena arrives and the time after the government issues a notice of inspection or immigration-related subpoena.

In-house counsel can educate managers and the human resources department to avoid common mistakes in connection with Form I-9.

- *Unnecessary reverification.* No one needs to calendar the expiration date of a driver's license or an alien resident card (a green card) for re-verification. In-house counsel should train relevant departments that asking an employee to re-establish continued employment eligibility following an identity document's expiration date some years after employment and requiring presentation of additional documentation could open up an employer to charges and fines related to document abuse and potentially even discrimination and disparate treatment.
- *Overzealous self-help.* When performing self-audits, human resources staff sometimes write in, complete or correct section No. 1 of Form I-9. In-house counsel should warn HR that completing this section is entirely the responsibility of the employee, who must personally complete the employee attestation. Only the employee — not HR — should make fixes to section No. 1, lest the attestation be undermined.
- *Going too far.* More is not necessarily better. HR and managers frequently fill out too many columns regarding documents — filling in Form I-9 columns A, B and C. The legally correct approach is to fill out column A *or* B and C. Such errors indicate that the employer has required the prospective employee to present more forms of identification and/or employment eligibility documents than the law requires.

This is risky, and the legal department should explain why: Subjecting only people who appear to be minorities or born in other countries to excessive documentation requests could create a rebuttable presumption of discriminatory employment practices.

- *Lack of objectivity*. When bringing a new administrator or HR representative on board, some organizations do not think ahead about who is going to complete the Form I-9, witness the presentation of documents and attest that they are genuine. That can result in the new hire attesting to herself about her presentation of employment eligibility verification documents: "I attest that I have presented my employment eligibility verification documents to myself and they appear genuine and relate to the individual named (me)."

Handling an ICE Subpoena

Minimizing liability and correcting misguided HR practices before a government inquiry or investigation is the most effective method for reducing liability. Once ICE issues a subpoena, the opportunity for self-help and mitigation drops significantly.

Now is the time for the legal department to develop policies identifying the company's first responders. These people will address any inquiries from unscheduled government visitors. Then, it's time to ensure training for the receptionist.

Investigators normally will enter the worksite through the main entrance. Management should instruct the person who serves as visitors' first point of contact to notify the first responder immediately when government officials arrive. It's important to stress that that person refrain from discussing any company or employee information with the investigator.

Ideally, any paperwork the company files with the CIS will include only accurate, consistent information about the company. Files at the company should be centrally located, so that the first responder quickly and easily may access information for verification purposes. It will be helpful for the first responder to have payroll records, employee records showing date of hire and work location, and corporate financial information easily accessible.

In-house counsel should know that the posture of an employer who is not under investigation is radically different from the posture of an employer who has received a subpoena. Once ICE issues a subpoena, responding prudently is as important as the company's ongoing business operations. It can become a considerable management and operations distraction, but it's critical.

- *Move quickly*. Once the government issues a subpoena, the company must respond in final form within three days. The legal department needs an initial analysis of potential exposure within the days following the government's appearance on its doorstep, so lawyers can decide whether the company's strategy should be responsiveness or point-by-point contention.

- *Just say "no."* ICE often attempts to outflank future challenges to its notices and subpoenas by securing permission to review company documents. It may be tempting for employees to grant that permission. The mere

presence of ICE agents may intimidate receptionists and lower-level employees, leading those workers to hand over whatever the agents request — sometimes more.

But in-house counsel should inform all employees that all communication with the government goes through the legal department. Generally speaking, there is a three-day notice to locate, assemble, analyze, chart, photocopy and deliver documents. It is invaluable for the legal department to analyze existing liability before ICE begins building its theory of the case.

The legal department should teach employees at all levels that no one should attempt to have a friendly conversation with ICE agents. The company gains little and loses much when employees chit-chat about deficiencies, mistakes, practices, etc. It is human nature to attempt to establish good faith and lack of personal culpability; however, lack of malice aforethought and innocence are distinct concepts.

Government agents are trained to gather evidence of employer wrongdoing and to prepare a case to be forwarded to the U.S. attorney for potential prosecution. Private sector understandings of what is reasonable and appropriate may be very distinct from the expectations of a government investigator.

- *Cooperate.* Without being unnecessarily forthcoming and waiving rights of representation and response timeframes, the legal department should coach first responders and other involved employees not to act cantankerous and combative with the agent during the investigation. Some company owners react with a sincere and emotional response that the government unfairly is singling them out and persecuting them in industries rife with violators.

But the reality is that the government has broad rights in immigration law. It eventually will get much, if not all, of what it seeks. In-house counsel should caution first responders and company leaders that it's counterproductive to draw attention, potentially securing the lasting focus of an investigator, who has tremendous discretion and resources.

Compliance starts with comprehensive policies, a trained, well-informed staff and consistent practice.