CHAPTER 17 - ICE I-9 AUDITS

17.1 What is an ICE audit (also called Notice of Inspection)?

It occurs when U.S. Immigration and Customs Enforcement (ICE) agents deliver a Notice of Inspection (NOI) and subpoena. (In a few jurisdictions, such as Philadelphia, ICE does not normally include a subpoena.) More recently, NOI's are being delivered by FedEx or certified mail. Occasionally, a contractor mails the document, which is simply a NOI because contractors lack authority to issue subpoenas.

The NOI/subpoena demands the employer produce the Forms I-9 of all current employees and all supporting documentation, including copies of documents presented (such as passport, lawful permanent resident card, Employment Authorization document (EAD), driver's license, Social Security card, or birth certificate) and any E-Verify confirmations or other E-Verify paperwork. It may also seek the Forms I-9 of terminated employees, who were terminated in the last one to three years. It is within the discretion of U.S. Immigration and Customs Enforcement (ICE) on whether the Forms I-9 of terminated employees are sought and, if so, for what length of time though no longer than three years back.

17.1A What type of information is sought in the subpoena/NOI?

Below are some of the documents that the NOI/subpoena will seek:

1. List of names of employees (either current or current and terminated – see above) including dates of hire, dates of termination, Social Security numbers, maybe dates of birth, department, and shift.
2. Most recent payroll report and maybe one immediately prior payroll report.
3. Federal tax quarterly reports (Form 941) for the past two to four quarters.
4. Copy of Articles of Incorporation.
5. Copy of business licenses.
6. Employer's FEIN.
7. List of the employer's officers and titles.
8. Information concerning the owner(s) such as home address, email address, Social Security number, telephone numbers, etc.
9. If the employer uses E-Verify, the Memorandum of Understanding (MOU).
10. Whether the Employer uses SSNVS.

11. Any Social Security Administration (SSA) no-match letters that the employer has received and any responses.
12. Names and maybe addresses and Forms 1099 of any contractors or independent contractors.
13. Names and maybe addresses of all staffing companies utilized, and sometimes those contract(s).

There is not a template for the subpoena/NOI; thus, different ICE offices request different subpoenas. At one time, ICE was considering issuing a template of a Notice of Inspection/Subpoena but that has never come to fruition.

17.2 How does U.S. Immigration and Customs Enforcement (ICE) decide which cases to investigate?

U.S. Immigration and Customs Enforcement (ICE) may investigate cases on its own initiative and need not have received a verbal or written complaint. When ICE does receive a complaint, it has the discretion to decide whether the complaint has a reasonable probability of validity and whether to investigate (8 CFR Section 274a.9(b)).

Certain industries, such as are critical infrastructure, hospitality, construction, and manufacturing, are more likely to receive NOIs. Additionally, often a federal investigation by one agency, such as OSHA, Wage & Hour, or DEA, will lead to a NOI based upon information discovered in the initial investigation. Finally, a foreign national may be arrested and once their undocumented status is found out, ICE may begin an investigation, sometimes with the foreign national employee working as an "undercover source" in exchange for deferral of removal and an Employment Authorization Document(EAD).

17.3 After receipt of the NOI, what should the employer do?

The employer should immediately contact your legal counsel. If one has immigration counsel, contact him/her. There is a good chance even if you have immigration counsel, there needs to be a referral to immigration counsel experienced in worksite enforcement as most immigration attorneys do not handle worksite enforcement matters.

In California and Oregon, by state statute, an employer must post a notice of the audit within 72 hours regardless of whether receive an extension to respond.

After you have compiled your response to the NOI/subpoena, you should scan a copy of each-and-every document produced. There are times that Auditors will "lose" Forms I-9. You may also *need* the Form I-9 during the pendency of the audit (to provide to legal counsel, if retained at a later date, to document a reverification, add a termination date to the additional information field, conduct an internal audit (to understand what ICE may find), or to correct technical violations (discussed below)).

17.4 How long does the employer have to produce the requested documents?

ICE must provide at least three business days to produce the documents. An employer can waive the three days but under no circumstances should an employer do so. Often, ICE will provide greater than three days. If the NOI is served by FedEx, the time period to respond is usually longer, as much as two weeks.

17.5 Can an employer get an extension of time to respond to the NOI?

Yes, an employer may request a reasonable extension of time to respond. ICE's response varies from office to office. Some ICE offices, such as Atlanta and Chicago, do not normally grant extensions on the production of the Forms I-9. Other ICE offices, such as Nashville, Memphis, Boston, New Orleans, Little Rock, Jackson, MS, Honolulu, San Francisco, Philadelphia, and Miami, will normally grant a reasonable extension of time, such as three to seven days. The longer the requested extension, the more likely it will be denied.

When making such requests, as with all interactions during a government investigation, attorneys should make a record of all interactions with ICE. Extensions requests, if feasible, should be made by email to the Special Agent and the Auditor working the case.

Concerning all records that are not Forms I-9, the three-day period does not statutorily apply, and ICE offices will liberally grant seven to 14-day extensions on the production of these records.

17.6 Can an employer remediate errors located on the Forms I-9?

Yes, in most cases. It is very advantageous for an employer to correct errors on the Forms I-9. Scott McCormack, former National Program Director of ICE's Worksite Enforcement Unit, stated

at an AILA Worksite Enforcement conference in September 2019, employers should be able to make corrections on their Forms I-9 between receipt of the NOI and delivery of the Forms I-9 to ICE. If one remediates the errors on the existing Forms I-9, one may substantially decrease the number of substantive errors located by the ICE forensic auditor; thus, it will lower any penalties assessed against an employer.

A few ICE offices prohibit the employer from making any additions or corrections on existing Forms I-9 but even in those cases, you may be able to submit a new Form I-9 attached to the existing Forms I-9. If the subpoena/NOI states it is being delivered due to a criminal investigation, a very rare occasion, it is wise to not make any corrections or additions to the existing Forms I-9.

17.7 Are there any tips on remediating errors on Form I-9s?

Yes, one must be very careful in remediating the Forms I-9. If you are not careful in doing so, you may do more harm than good. An example would be where an employer failed to complete any of Section 2 of the Form I-9 and then completes a new Form I-9 and shreds the old Form I-9. When you are remediating I-9 errors, you must always retain the new Form I-9 as well as the existing Form I-9. Transparency is key; the auditor will want to see all steps of what happened. When remediating paper Forms I-9, ensure that any corrections are made in a different colored pen and initialed and remember that only the employee may update or correct Section 1.

17.8 If at the time of the receipt of the NOI, an employer has no Form I-9s, what should the employer do?

One should immediately obtain a Form I-9 from all existing employees. However, ICE will consider the newly filled out Forms I-9 to be untimely prepared. However, it is better to have untimely completed Forms I-9 than no Forms I-9. Additionally, the employer should explain an untimely Form I-9 either in an attached memo or a notation on the Form I-9. The "Additional Information" field in Section 2 is a suitable place for the notation.

17.9 Will the employer face a penalty for each Form I-9 not timely completed?

Under a strict interpretation of IRCA, the employer faces a penalty for each Form I-9 untimely completed. However, in the past, there have been clients, who receive warning notices, rather than penalties, for these violations. The penalties could have been between $15,000 and $40,000 for the clients, who were small restaurants. ICE's reasoning for the warning notices, rather than penalties, is the NOI is an educational lesson for small employers, who may not have realized the necessity of having Forms I-9, especially on employees who were family or friends.

17.11 In what format must Forms I-9 be provided to U.S. Immigration and Customs Enforcement (ICE) auditors?

The original Forms I-9 must be provided for inspection, whether paper or electronic. [Exception: Recruiters or referrers for a fee who designate an employer to handle Form I-9 completion may present copies of the Forms I-9.] If an employer retains Forms I-9 in an electronic format, whether stored as such or in that original format, the employer must retrieve and reproduce the specific forms requested by the NOI/subpoena as well as the associated audit trails showing who accessed the computer system, when it occurred, and the actions performed on the system in a specified period of time. The inspecting officer must also be provided with the necessary hardware and software. Finally, an inspecting officer is permitted to request an electronic summary of all the immigration fields on an electronically stored Form I-9.

17.12 What if records are kept at a different location from where the U.S. Immigration and Customs Enforcement (ICE) agents will be visiting?

If the Forms I-9 are stored at a location other than the worksite, the employer must inform the inspecting officer where they are kept and cooperate with the inspector in making the forms available either at the location where they are kept or at the office of the government agency conducting the inspection.

17.13 After the Forms I-9 are submitted, who reviews them?

In most cases, it is an ICE forensic auditor, whose sole job is to analyze Forms I-9 submitted, to locate errors and determine whether employee's documentation reflects authorization to work in the United States.

17.14 How long does an ICE audit take from the submission of the Forms I-9 to an initial response from the ICE auditor?

It depends. In some cases, the auditor finishes the audit in one to two months although most audits last six months to several years. Obviously, one factor is the size of the workforce and the number of Forms I-9 to analyze. The more Forms I-9, the longer the audit.

17.15 What kind of notices can be provided to the employer during or at the end of the audit?

There are six possible Notices to be received, which are Notice of Technical or Procedural Failures, Notice of Suspect Documents, Notice of Discrepancies, Notification of Inspection Results, Warning Notice, and Notice of Intent to Fine (NIF).

17.16 What is a Notice of Technical or Procedural Failures?

This notice is issued if the employer's Forms I-9 have minor or technical errors. Many Forms I-9 have technical errors. Some examples of technical errors are: home address or date of birth of employee not listed; USCIS number (also called Alien number) missing in Section 1 but listed in Section 2 or on legible copy of document, which is attached to the Form I-9; some information is missing in Lists A, B or C, such as expiration date, issuing authority, or title of document, but listed on legible copy of document attached to the I-9 form; and business name and/or address is missing.

The good news with this notice is that the employer will not be assessed a penalty if the errors are corrected within 10 business days of being notified by U.S. Immigration and Customs Enforcement (ICE). Sometimes the errors cannot be corrected, such as an untimely date that the Form I-9 was signed, use of wrong edition of Form I-9, and use of Spanish edition of the Form I-9 (prohibited except for Puerto Rico). Even then, ICE will not issue a penalty if the employer attaches the correct form to the wrong one (old edition or Spanish). Also, if the technical error is in Section 1 and the employee in question is no longer employed, one may document that employee is not employed and it should not become an error for which you will be penalized.

17.17 What is a Notice of Suspect Documents (NSD)?

It is a notice advising the employer that based on a review of the Forms I-9 and documentation submitted by the employee, and government databases, ICE has determined an employee is unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing to employ that individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if one believes the finding is in error. Many employers will not receive an NSD because it does not employ any undocumented employees.

17.18 What must an employer do after receipt of a Notice of Suspect Documents?

The employer must notify each designated employee that ICE has determined the work authorization document submitted by the employee to the employer for Form I-9 verification purposes are not valid. Then, the employer must give the employee an opportunity to provide other document(s) to prove authorization to work in the United States (so-called "newer and better" documents). This notification should be in writing to each designated employee.

The employer must provide ICE any new documents within 10 business days of the NSD unless one can negotiate a lengthier period of time to respond. If the documents are found valid for work authorization, ICE will remove them from the NSD. If employees do not provide new documentation or the documentation is invalid, employers must terminate those employees or face penalties for knowingly employing undocumented workers.

Some employers may be able to negotiate a "wind down" period with ICE, whereby they terminate a certain number of employees who cannot meet Form I-9 requirements each week or every other week to avoid catastrophic labor disruptions. Employers seeking such a "wind down" period should present the Special Agent and Auditor with a written plan detailing how they intend on implementing the wind down period.

Under California state law, employers must notify its employees, individually, of the results of the I-9 audit by Immigration and Customs Enforcement (ICE) within 72 hours of receiving the results of the NOI.

17.19 What is a Notice of Discrepancies?

It advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine an employee's work eligibility. The employer should provide the employee with a copy of the notice and give the employee an opportunity to present ICE with additional documentation to establish their employment eligibility. U.S. Immigration and Customs Enforcement (ICE) may want to interview that individual.

17.20 Can an employer be penalized if it properly completed a Form I-9, but the employee turns out to be unauthorized?

No, unless the employer had knowledge, actual or constructive, that the employee is not authorized to work. Employers, who do not have knowledge that the employee is unauthorized to work, will have a good-faith defense against any penalties that might be imposed for knowingly hiring an unauthorized employee.

However, as discussed above, an employer who fails to terminate an employee who cannot present "newer and better" documents in response to a NSD can face civil and criminal penalties for knowingly continuing to employ such a person.

17.21 What is a Notification of Inspection Results?

At the conclusion of the audit, if everything is perfect on the Forms I-9 and there are no undocumented workers, an employer will receive a Notification of Inspection Results. However, this Notice is very rare.

17.22 What is a Warning Notice?

A Warning Notice states the basis for the substantive violations and which sections of the law have been violated. However, U.S. Immigration and Customs Enforcement (ICE) has decided to use their discretion and issue a Warning Notice instead of a penalty. In so doing, there is the expectation of future compliance by the employer. Additionally, ICE will sometimes return, usually within a year or two years, to conduct a new audit. If violations are found, ICE may consider the employer to be a second offender with heftier penalties.

17.23 What is a Notice of Intent to Fine (NIF)?

This is a final notice of the ICE audit. If U.S. Immigration and Customs Enforcement (ICE) determines a violation of the employer sanctions rules, either substantive, uncorrected technical, knowingly hire unauthorized employee(s) and/or continuing to employ unauthorized employee(s), have occurred, it will issue a Notice of Intent to Fine (NIF). (Exception: See 17.22 concerning Warning Notice.]

If a NIF is issued, the notice must contain the charges - substantive and uncorrected technical errors, knowingly hire unauthorized employee(s) and/or continuing to employ unauthorized employee(s), the basis for the charge, the sections of the law violated, and the penalty to be imposed for each violation and total amount of penalties. It also must advise the employer of the right to counsel, that any statement given by the employer may be used against the employer, and that the employer is entitled to a hearing before an administrative law judge (ALJ).

17.23a What must an employer do to challenge a NIF?

If an employer wants to challenge the fine, it must file with the issuing ICE office, within 30 days of being served with the notice, that it reserves the right to a hearing before an ALJ of OCAHO. If no appeal is filed, U.S. Immigration and Customs Enforcement (ICE) will issue a final order 45 days from the issuance of the NIF. The NIF will contain contact information for challenging the NIF. Attorneys should first contact that person usually an attorney with the local Office of the Principal Legal Advisor (OPLA) office, upon receipt of the NIF to inform ICE of the employer's intent to contest the NIF. Thereafter, follow-up that discussion with an email and mailed notice to ICE/OPLA challenging the NIF. The Notice does not have to contest or dispute the charges, it must merely ask for a hearing.

17.24 What is the difference between a substantive error and a technical error?

Substantive errors are those errors that cause a penalty to be assessed against the employer. Technical errors are minor issues that ICE will allow you to correct. To qualify as a technical error, there must be a good faith attempt to comply with the paperwork requirements of INA section 274A(b). When technical errors are found during an ICE I-9 audit, an employer is given ten government days to make corrections. Technical errors that are corrected will not result in a fine. However, uncorrected technical errors become substantive errors.

17.25 What are examples of substantive errors?

The following are examples of substantive errors:

- Failing to prepare and/or produce a Form I-9;
- Failing to timely complete a Form I-9;
- No box checked in Section 1 of Form I-9 or multiple boxes were checked attesting to the employee's status;
- No employee signature in Section 1;
- No employer signature in Section 2;
- No USCIS or Alien number provided in Section 1 for lawful permanent residents or non-citizens authorized to work, and the number is not recorded in Section 2, or there is not a legible copy of a document retained with the form and presented at inspection, which provides the number;
- List A, B, or C data not fully recorded in Section 2, such as name or number of documentation, issuing authority, or expiration date, where applicable, and legible copies of the documents, bearing this information, were not retained, and provided to ICE;
- Unacceptable documents recorded in Lists A, B and/or C;
- Failing to date section 2 of the Form I-9 within three business days after the employee's first date of employment;
- Failing to correctly describe the document in Supplement B (formerly Section 3), when a legible copy of the document was not retained and provided to ICE at the time of inspection;
- Failing to sign Supplement B (formerly Section 3) when required;
- Failing to date Supplement B (formerly Section 3), or date the section no later than the date of expiration of the individual's work authorization.

17.26 What are examples of technical errors?

The following are examples of technical errors:

- Failure to ensure an individual provides "other last names used," if applicable, address and birth date in Section 1;

- Failure to ensure that an individual provides his USCIS/Alien number in Section 1, but it is listed in Section 2 or on a legible copy of a document retained with Form I-9 and presented at the ICE inspection;
- Failure to ensure that the employee dates Section 1 at the time of hire (for employees hired on or after 09/30/1996);
- Failure to complete the "Preparer and/or Translator Certification" when someone assists the employee in completing Section 1;
- Failure to provide the document number or title, issuing authority, identification, or expiration date, where applicable, of a proper List A, B and/or C document(s) in Section 2, but only if a legible copy of the documentation is retained with the Form I-9 and presented at the ICE inspection;
- Failure to provide the first day of employment in the Certification (when the Certification was completed on or after 09/30/1996);
- Failure to provide the representative's title, company name and/or address in the Certification;
- In Supplement B (formerly Section 3), failure to provide the date of the employee's rehiring.

17.27 How does U.S. Immigration and Customs Enforcement (ICE) calculate the penalties?

ICE has a Memorandum entitled, "Revised Administrative Fine Policy Procedures," which contains specific procedures to follow for calculating paperwork and "Hiring or Continuing to Employ (H/CTE) fines." The procedures state the following to determine the level of fine:

- Use the number of violations of each type (paperwork or H/CTE) as the numerator and the number of total employees as the denominator.
- The percentage calculated above would be used to determine the percentage box in the fine matrix to start; and
- The fines could be adjusted up or down five percent for each of the five statutory factors - business size – small (less than 100 employees)/large; good faith/bad faith; seriousness; employment of unauthorized workers; and prior history of violations in an ICE/INS audit.

To increase the level of penalties, ICE has begun to create a higher level of fine on each matrix by adding the number of paperwork violations to the number of H/CTE violations as the numerator. This is resulting in a higher fine based on the matrix percentage of violations for each of the paperwork and H/CTE violations. Here are examples of the difference in penalties:

- If you have 100 employees with 10 substantive paperwork violations and 20 H/CTE violations, you add 10 + 20 = 30 to calculate 30% violations for each matrix. This would lead to a fine of approximately $60,270 using recent matrixes.
- If you have 100 employees with 10 substantive paperwork violations and 20 H/CTE violations, you add 10/100 = 10% for paperwork and 20/100 = 20% for H/CTE violations for each matrix. This would lead to a fine of $40,560 without any aggravating or mitigating factors applied.

ICE has defended this calculation method by pointing to language in its 2008 fine policy procedures, "The recommended base fine amount is determined by dividing the number of 'knowing hire,' 'continuing to employ,' and substantive verification violations by the total number of Forms I-9 presented for inspection to determine a violation percentage." However, the next two pages of the fine policy procedures instructs agents to "divide the number of 'knowing hire' and 'continuing to employ' violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage" and to "divide the number of substantive violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage." Each instruction is paired with a separate fine matrix. No other ICE documentation instructs agents or attorneys to add the violations together.

17.28 What are the amounts in the matrix that ICE uses in calculating the fine/penalty?

Substantive errors (also referred to paperwork violations) can result in significant fines. Each Form I-9 with a substantive error—mistake or missing item—can result in a penalty from $272 to $2701 per form for the first offense. The level of the penalty is based on the percentage of Form I-9 errors. ICE uses a matrix but has refused to publish it for the past five years. The following is my best estimate of the current matrix:

- 0–9%: $272;
- 10–19%: $659;
- 20–29%: $1055;

- 30–39%: $1,450;
- 40–49%: $1,855;
- 50% and above: $2,240.

For second and third offenses, ICE did not release minimum on the 2023 matrix though we know the maximum is statutorily capped at $2,701.

There are separate penalties for hiring or continuing to employ unauthorized workers (referred to in IRCA as aliens). The fines are as follows:

- First offense: $676 to $5,404 for each unauthorized employee.
- Second offense: $5,404 to $13,508 for each unauthorized employee.
- Third and subsequent offenses: $8,106 to $27,108 for each unauthorized employee.

17.28a Are their factors that U.S. Immigration and Customs Enforcement (ICE) must consider when determining the total penalties?

Yes, U.S. Immigration and Customs Enforcement (ICE) will consider the following statutory factors in mitigating or aggravating the fine by 5 percent per factor:

- Business's size – large or small.
- Employer's good faith/bad faith.
- Seriousness of the violation.
- Whether the individual was unauthorized to work.
- History of violations as found by ICE/INS by the employer.

17.29 Can the Notice of Intent to Fine (NIF) be appealed?

Yes, an employer may contest a NIF if the employer provides appropriate notice within 30 days of the NIF. See § 17.23a

17.30 If an employer appeals the NIF, will the matter be immediately set for trial?

No. The appeal notice just preserves the employer's right to litigate if a settlement on the penalties cannot be reached. If one fails to provide a timely appeal notice, the employer has lost all leverage in the negotiations as ICE knows it does not need to move in negotiations because the employer cannot litigate the matter without timely notice.

17.31 Should an employer seek to negotiate with ICE to lower the fine/penalty?

Yes. I strongly advise employers to seek to negotiate a lower dollar amount of penalties in almost all circumstances. If the fine is for $5,000 or less, it may not be worth it because the savings of the lower fine could be offset by the attorney's fees. However, in almost all cases, ICE will offer a 10% reduction without any negotiations. In almost all cases, the 10% reduction is just the starting point for ICE in negotiations.

17.32 How do you successfully negotiate with ICE to lower the penalties?

First, you must analyze the allegations within the NIF. One is looking for errors by ICE within the audit. The ICE forensic auditor conducts lots of Form I-9 audits and being human, makes errors. These are common errors by the ICE forensic auditor:

a. Timeliness errors which are beyond the five-year statute of limitations.
b. Finding an owner failed to complete a Form I-9, even though caselaw states an owner with an interest in the company and managerial authority does not need to complete a Form I-9. *See United States v. Santiago's Repacking, Inc.*, 10 OCAHO no. 1153 (2012).
c. Counting same allegations twice in the NIF.
d. Citing the failure to have a Form I-9 for an employee who is grandfathered in - meaning no I-9 form is needed because he/she was hired before November 7, 1986.
e. Counting a technical error as a substantive error (i.e., employee's failure to write full address in Section 1).
f. Failing to use mitigating factors, such as small size of employer and no prior history of violations, to lower the penalties.
g. Using bad faith as an aggravating factor (it is exceedingly difficult for ICE to prove bad faith).

h. Citing 5% aggravating factor of employment of undocumented workers on all violations, instead of just on violations involving undocumented workers.

17.33 Can an employer's financial condition be used to lower the I-9 penalties?

Yes, however, you must be able to document this argument with financial records. A statement from a management official is insufficient. One must be able to show the poor financial shape and how payment of the penalties would cause the employer to shut down.

17.34 Are there any other arguments that can be made to attempt to lower the penalties?

Yes. One is to argue the penalties are excessive and punitive toward the employer.

17.35 Can the employer negotiate to pay the penalties over time and how much time is possible?

Yes, ICE is normally amenable to time payments if one can show financial inability to pay through records. The period is usually two to three years, although it could be as high as five years. However, an important caveat - do not negotiate time payments until a penalty amount is agreed upon. If you do beforehand, ICE will usually state it will either lower the amount or agree to time payments but not both. Alternatively, after the settlement agreement, one can negotiate for time payments with ICE's financial office in Burlington, Vermont.

17.36 What happens if the parties fail to reach a settlement after issuance of a NIF?

Here are the steps:

a) Complaint is filed with OCAHO and served on the employer;

b) Notice of Case Assignment is issued on both parties by the ALJ;

c) Answer is filed by the employer.

d) Government files a Motion for Summary Judgment.

e) Employer usually opposes such Motion.

f) Employer may file its own Motion for Summary Judgment.

g) OCAHO ALJ issues a Decision; and

h) Decision can be appealed to Chief Administrative Hearing Officer (CAHO).

17.37 Where is the hearing/trial held?

There is not normally a hearing or trial. Rather, each party files documents on why the facts support or do not support I-9 violations. If there are material facts in dispute, there must be a trial or hearing.

17.38 If a settlement is not reached, can one anticipate a reduction in penalties when the case is litigated before the Office of Chief Administrative Hearing Officer (OCAHO)?

Again, every case is different with some employers not receiving any reduction through litigation at OCAHO. However, yearly studies show most employers get lower penalties from 25 to 40% as a result of litigation.

17.39 Is the final decision of OCAHO appealable? If so, to where?

OCAHO's decision may be appealed through a Petition for Review to the applicable Circuit Court of Appeals (either where the employer is located or the D.C. Circuit Court of Appeals, where OCAHO is located).

Chapter 18 – ICE Raids

18.1 What is an ICE raid on an employer?

An U.S. Immigration and Customs Enforcement (ICE) raid (called a targeted enforcement operation by ICE) is like it sounds – ICE, through its investigative component, Homeland Security Investigations (HSI), arrives at the employer's premises without warning – hoping to catch employers and employees off guard. [NOTE: Since 2021, the Biden Administration has ceased ICE raids that were resumed in the Trump Administration in 2018.]

When ICE arrives at the employer's premises, its agents surround the premises and usually have aerial presence, airplane, or helicopter. The HSI agents enter the business with a criminal search warrant. The search warrant will have a detailed description of what and where agents are going to search and what they may seize.

Additionally, during a worksite raid, if ICE discovers unauthorized workers at the site, they will arrest, detain them, and place them in Immigration Court, or federal court if a federal crime, such as identity theft has occurred.

18.2 What kind of records are sought in a criminal search warrant served by ICE in a raid?

1. All documents, records, and implements (whether in electronic or hard-copy format), information and communication relating to: violations concerning Unlawful Employment of Aliens, Fraud and misuse of visas, work permits, and other documents to gain employment, Fraud in connection with identification documents, authentications features, and information, False statements to obtain benefits or employment, and Use of Unauthorized Social Security Number.

2. Labor and employment records including: service agreements, independent contractor agreements, Form I-9s and any supporting documents, volunteer worker agreements and statements, lists of workers (paid or unpaid), job assignment sheets, duty rosters, employment applications, personnel files, worker identification documents, and electronic communications related to the same.

3. Business records including: payroll records, timesheets, lists of employees, communications with outside payroll services providers; bank records, financial statements, bookkeeping/accounting records, and notes, including records disclosing the identity and purpose of all deposits, withdrawals, debit and credit memos, interest received on the accounts.

3. Identification documents including: driver's licenses, state identification cards, birth certificates, Social Security cards, Permanent Resident cards, or any other documents that may be used to enter, remain, or work in the United States, including counterfeit immigration documents and/or seals.

4. All correspondence to or from said employer and the U.S. Department of Labor, Social Security Administration, and the IRS regarding employee identification documentation provided by said employer.

5. Employee identification cards and copies of employee identification cards.

6. Documentation of business ownership, organization, and control including articles of incorporation and corporate minutes.

7. Evidence of who used, owned, or controlled the computer at the time the things described in this warrant were created, edited, or deleted.

18.3 What is the difference between an ICE raid and an ICE audit?

As discussed in Chapter 17, an ICE audit occurs when U.S. Immigration and Customs Enforcement (ICE) agents or FedEx deliver a Notice of Inspection (NOI) and subpoena. The NOI/subpoena demands the employer produce the Form I-9s of all current employees and all supporting documentation (such as passport, lawful permanent resident card, Employment Authorization document (EAD), driver's license, Social Security card, or birth certificate) and any E-Verify authorizations or other E-Verify paperwork. It may also seek the I-9 of terminated employees, who were terminated in the last one to three years. The NOI/subpoena also seeks payroll records and other employer records.

18.4 What should employer representatives do during a raid?

Employers are not required to answer ICE questions during a worksite raid. However, employer representatives may not obstruct the raid or provide false or misleading information. One should immediately call immigration counsel. Even if counsel is out of state, he or she may be able to speak by phone with the ICE agent in charge and provide valuable advice to the employer.

During an ICE raid, employers should:

- record the names of the ICE supervising agent and US attorney assigned to the case.
- assign company representatives to accompany each ICE agent as they move around your workplace.
- provide ICE agents access to your facility in accordance with the warrant.
- object to any searches that are outside the scope of the warrant and ask the ICE agent to make note of it.
- protect privileged documents to the extent possible.
- obtain a list of items seized during the search.

18.5 What causes ICE to conduct a raid?

Raids often occur after an ongoing investigation shows a number of undocumented workers are employed there, often with the knowledge and/or assistance of the employer.

Additionally, HSI may receive tips of unlawful activity by various individuals. Raids may occur in conjunction with an investigation by another federal agency, such as the Internal Revenue Service.

After ICE receives information, it often uses a confidential informant to infiltrate the workforce and gather further information. The confidential informant may clandestinely record audio and/or shoot video of incriminating evidence. Additionally, in one case, it used aerial photography to demonstrate an employer filed false quarterly tax returns on the size of his workforce. In another case, ICE reviewed records from Alternatives to Detention (ATD) program and determined numerous undocumented workers with ankle monitor bracelets provided upon release from ICE detention, were employed at the plants in question.

18.6 How does ICE receive the authority to raid an employer?

ICE applies for a criminal search warrant with the appropriate federal district court. In the application, ICE provides a detailed sworn affidavit from a government official with knowledge of the situation. In one application, it was 29 pages with 13 additional pages of attachments.

18.7 What can be done to minimize chances of an ICE raid?

It may sound simple – do not commit criminal/civil violations, such as paying employees in cash, not completing Forms I-9, committing tax fraud, and harboring undocumented workers. In most of the ICE raids, employers have committed one or more of these criminal/civil violations. Some employers have committed all these criminal/civil violations.

Another lesson learned from the Mississippi ICE raids, as described in 18.5 and 18.11, if employees or applicants are wearing ankle monitor bracelets, there is a likelihood that they are undocumented.

18.8 Has ICE always conducted raids on employers?

No, from August 2008 to April 2018, ICE stopped conducting raids on employers. In the fall of 2008, the George W. Bush Administration stopped ICE raids after ones at the Agriprocessors, Inc. slaughterhouse and meat packing plant in Postville, Iowa and the Howard Industries transformer plant in Laurel, Mississippi, drew a tremendous amount of negative publicity due to children being left without their parents to care for them or even pick them up from school. Additionally, the raids were very expensive with the Howard Industries raid costing over $5.2 million.

ICE raids returned under the Trump administration with the first occurring on April 5, 2018 at the Southeastern Provisions slaughterhouse in Bean Station, Tennessee.

18.9 What caused the return of ICE raids?

It can be attributed to the Trump Administration's crusade to get tough on illegal immigration.

18.10 How many ICE raids occurred from April 2018 to January 2021?

Over 50 ICE raids occurred.

18.11 What is the largest ICE raid since April 2018?

The seven raids conducted at chicken processing plants in six small towns in middle Mississippi (Bay Springs, Carthage, Canton, Morton, Pelahatchie, and Sebastopol) caused 680 workers to be detained.

Other large ICE raids have occurred at CVE Technology Group in Allen, Texas (280 workers detained) and Load Trail LLC in Sumner, Texas (160 employees detained).