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## Texas Employers Hit Hard by New ICE Initiative: Steps to Prevent Being “Next”

### *Texas Employers Hit Hard by New ICE Initiative*

On July 1, 2009, the U.S. Immigration & Customs Enforcement Office (ICE) issued Notices of Inspection to a record 652 employers across the nation. Sources initially identified that 111 of those Notices were served on Texas employers: Dallas – 20, El Paso – 26, Houston – 26 and San Antonio – 39. If these numbers prove accurate, Texas employers received more notices than employers in any other state, including those states with heavy immigrant populations like California, New York and Florida.

Foster Quan attorneys have confirmed with government investigators that ICE has directed local offices to “go after employers” and shift their focus from targeting individuals in violation of immigration law to targeting businesses who are employing unauthorized workers. Local ICE offices in Texas have received funding to increase resources for worksite investigation teams that investigate Form I-9 violations and assess civil and criminal penalties against employers. ICE agency spokeswoman, Pat Riley, has affirmed, “Part of the strategy is to let businesses know we mean business.”

Employers served with a Notice of Inspection are typically given only 72 hours to produce Forms I-9 and other documentation to ICE inspectors. A team of forensic auditors and attorneys then comb through all evidence to identify any compliance violations and to assess fines and penalties. Error rates in Form I-9 compliance are extremely high. And, because civil fines for paperwork violations can reach up to \$1,100 per form (regardless of the immigration status of the worker), for many employers, such an investigation could result in crippling penalties.

On Friday, August 7, 2009, Houston-based Shipley Do-Nut Flour and Supply Company Inc. was sentenced to pay criminal fines of \$250,000. The company was also required to forfeit \$1,334,000 to ICE for harboring illegal aliens. Three managers who had hiring authority and were responsible for making employment-related decisions on behalf of the organization were each sentenced to six months probation and were individually assessed fines ranging from \$1000 – \$2000. The President of the company was sentenced to a similar probationary term and was personally fined \$6,000. The investigation into this company was initiated in January of 2008, beginning with the review of the company’s Forms I-9.

Texas employers should be on Notice of this recent activity and take immediate, proactive steps to review options for improving Form I-9 compliance.

### *How to Protect Your Company*

#### **1. Don’t Wait for ICE to Come Knocking – Formulate Comprehensive Policies Now**

The most beneficial step you can take to protect your company against fines and allegations of civil and criminal immigration violations is to be proactive about immigration compliance. Companies should prepare comprehensive policies and formulate consistent protocols for Form I-9 completion, reverification and retention; for responding to notifications from the Social Security Administration; and, for responding to government agents/officers who may appear at company worksites. It is prudent to seek assistance from immigration experts and attorneys when preparing and distributing these policies. Consistent and systematic use of a carefully-drafted and internally consistent policy addressing all relevant immigration regulations and practices can often make a significant difference in avoiding or minimizing penalties assessed if the company is investigated and prosecuted.

A policy is no good if the users are not trained on how to implement the policy. For this reason, it is recommended companies provide training to those tasked with implementing and monitoring compliance with immigration policies. Appropriate and effective training that results in consistent, lawful practice is critical. The money spent to hire an expert to assist with this is often far less than the money assessed in civil and criminal fines (not to mention jail time) against companies who have been the subject of comprehensive ICE investigations. This fact is as true in a recession as it is in a booming economy.

## **2. Audit All I-9s**

If ICE initiates an investigation into your company, you will most likely be given only three days to provide ICE with Form I-9 records for all active and terminated employees. For even small to mid-size organizations, it can take three days just to gather the documents requested, let alone check the documents for completion/errors. If forms are proactively audited for compliance and mitigation of potential liability, the company will already have an idea of any errors made that cannot be corrected. Even more importantly, those responsible for I-9 compliance will have the opportunity to correct technical violations and complete missing information.

When done correctly by legal experts, Form I-9 compliance audits can quickly and effectively identify violations and offer solutions for making the records compliant. When done incorrectly, new, more serious violations (fraud, knowingly continuing to employ unauthorized workers, document tampering, etc.) may be triggered. For this reason, employers should consider hiring a third-party to conduct an independent audit. Hiring an immigration attorney experienced in Form I-9 Compliance and Audit practices provides the company with the privilege of discussing potential liability through confidential channels, and the benefit of obtaining a clinical, professional report. When done correctly, the end product should include the following:

- A. Compliant Forms I-9 for each active employee, properly annotated if corrected;
- B. A roster with Forms I-9 for all employees terminated within time period required for retention;
- C. A schedule for when Forms I-9 for terminated employees may be purged; and
- D. A report listing any outstanding issues that were not addressed during the audit, and why.

## **3. Consider an Electronic I-9 Solution for Future Compliance**

Anyone who has ever audited a company's Forms I-9 knows that the potential for error is extremely high – error rates are often well over 50 percent for companies with even the most highly-trained and sophisticated Human Resources professionals tasked with compliance. Recent ICE activity demonstrates that the government knows the statistical error rates well and has

specifically chosen Form I-9 review as a new method to generate revenue through the assessment of fines. In fact, when interviewed about the enormous fines imposed against Shipley Do-Nut Flour and Supply Company Inc., ICE Assistant Secretary John Morton stated, "ICE will hold employers and businesses accountable and will hit those who knowingly break the law where it hurts – their bottom line."

When assessing fines in these investigations, the regulations provide for higher assessments when a repeated pattern of errors is evident and particular behaviors in I-9 completion are apparent. Audit experience has demonstrated that many violations are repeated over and over and over – and when fees can be assessed on a per-form basis, even the smallest and seemingly insignificant errors can result in overwhelming monetary penalties when made repeatedly.

Purchasing a tested, reliable Form I-9 software program is a prudent investment, especially if the software is designed to require that the Form I-9 be compliant before it can be saved and archived. Most software packages also include mechanisms for reminding the employer when a form must be reverified and when a form may be deleted (after an employee has been terminated) because the retention period has passed. Another benefit is that all paperwork is retained electronically and can be accessed instantaneously, which is also very useful if ever required to produce such documentation for government investigators. As more and more businesses are consolidating files and records to an electronic format, it is often an economical and practical choice for companies to move to converting their Forms I-9 to electronic records, as well. And, as more and more employers are going to be required to participate in the government's E-Verify program, electronic Form I-9 compliance may become a necessity, as well as a convenience.

### ***Top 3 Indicators that an Employer Should Consider a Comprehensive Immigration Compliance Audit***

#### **1. Company is Currently or Will Soon Be Required to Participate in E-Verify.**

Effective September 8, 2009, most employers contracting with the Federal government will be required to register with and use the Department of Homeland Security's E-Verify program. Similarly, several states have enacted legislation requiring participation in E-Verify for some or all employers operating in those respective states.

The DHS has been promoting E-Verify participation as a method for employers to verify the employment authorization and identity documents provided by employees during the I-9 process. When an employee presents documents for I-9 compliance, the information is entered into the E-Verify database and cross-checked against various state and federal agency databases. Within a short period of time, the program sends a message that the documents are either confirmed as valid, or that there is a potential problem. Regardless of whether the information can be immediately confirmed through E-Verify, by entering such data into the database, the employer is opening the doors to possible ICE investigation of its worksite.

ICE has announced that it is "data mining" this database to compile information from the participating employers.

Once an employer has provided company information and has begun to use E-Verify, the records entered are subject to constant review, data mining and audit by the federal government for the

purpose of initiating worksite enforcement investigations. It is not a coincidence that many of the employers involved in large-scale worksite raids within the past few years were voluntarily participating in the DHS E-Verify Program (or its predecessor, the “Basic Pilot” Program).

2. **Company has received notification in the past from the Social Security Administration that information provided for one or more employees does not match information in the federal database.**

The Department of Homeland Security and Social Security Administration have joined forces to share information. Therefore, any prior social security “no-match” issues for the employer and/or individuals are subject to review by ICE.

3. **Company has been visited by state or federal officers, investigators, agents or individual complainants regarding identity fraud issues.**

When local law enforcement officers initiate investigations into individuals as a result of identity theft allegations, they will often first visit the employers listed in various government databases under the allegedly stolen identities. If a particular employer is visited frequently, especially by the same officer or team, ICE is often notified of the pattern. Similarly, if an employee admits to identity theft and admits that he/she is not work authorized, local officers often notify district DHS or ICE investigators. What begins as a tip to ICE that there may be undocumented workers at a particular worksite results in an investigation of the company’s Forms I-9 to review compliance practices and to assess civil and possibly criminal violations.

### ***Take Control to Eliminate Surprises***

The Obama Administration has voiced its commitment to strict enforcement of immigration regulations for all employers. The tool for such enforcement is the Form I-9, the completion and maintenance of which is universally required of all employers, and for all employees, regardless of their nationality. The potential for error when completing the Form I-9 is high, and the resulting fines are even higher. ICE offices in Texas have initiated dozens of worksite investigations this year, which could ultimately result in millions of dollars assessed against Texas employers for I-9 compliance-related violations. Prudent employers will proactively review compliance policies and standards, audit current records, and mitigate existing liability. Comprehensive policies, followed by professional, efficient, attorney-led audits, and supplemented by electronic Form I-9 software, will most effectively prepare your company to overcome common investigative hurdles.

For more information on I-9 Compliance issues, E-Verify, or I-9 Audit Practice pointers, please see the following links:

1. [U.S. Department of Homeland Security Announces E-Verify Compliance Data Mining Program](#)
2. [Employers Must Grapple With July 1<sup>st</sup> Rollout of E-Verify Requirements In Four Additional States](#)
3. [ICE Issues Wave of I-9 Audit Notices to Companies Nationwide](#)
4. [The Obama Administration Will Go Forward With the Federal Appropriations Regulation \(FAR\) Requiring the Use of E-Verify by Federal Contractors](#)

5. [The Obama Administration Makes Tactical Shift From the Social Security No-Match “Safe Harbor” Regulation to Subpoenas, Fines, and Indictments](#)