

Practice Alert: Recent Trends in ICE Notices of Inspection

*Courtesy of the AILA Verification & Documentation Liaison Committee
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On June 15, 2011, Immigration and Customs Enforcement (ICE) issued 1,000 Notices of Inspection (NOI) of I-9 forms and administrative subpoenas to U.S. companies. This is the largest I-9 inspection action since ICE issued 1,000 NOIs in November 2009, but unlike the 2009 action, ICE did not publicize its most recent enforcement effort. This wave of NOIs continues to demonstrate a pattern of inconsistent document requests and timelines for companies to respond.¹

Requests for I-9s for Current and/or Terminated Employees

In the most recent round of audits, most NOIs sought I-9s for both current and terminated employees. However, some NOIs requested I-9s only for current employees and in some of those cases, the NOI included a notice that I-9s for terminated employees could be requested later at the discretion of the inspector. In some cases, the NOI language was confusing and inconsistent. For example, one NOI requested I-9 forms for current employees, but then noted that the information requested related to all employees on the payroll for the past two years. In another NOI, ICE requested I-9 forms for all current employees, but then stated that all information requested related to current employees and employees terminated since October 1, 2010.

In some cases, the requests appear to exceed the employer's retention requirements under the law. For example, one NOI requests I-9s for all current employees, "as well as terminated employees from 2009 to present." Under the I-9 retention requirements, an employer is required to retain an I-9 for one year from the date of termination, or three years from the date of hire, whichever is later. If an employee had worked for the company for more than three years before employment was terminated in 2009, the employer should no longer have that I-9 in its files. In such a case, the attorney should negotiate to amend the request to conform with the regulatory requirements.

Timelines for Service and Response

In some cases, ICE verbally notified the company that it would receive the NOI the day before the document was served. Once the NOI was received, the time that ICE provided to respond to the NOIs varied significantly. Under 8 CFR §274a.2(b)(2)(ii), a company must be provided "with at least three days notice prior to an inspection of the Forms I-9." Several ICE offices strictly limited the NOI response time to three business days. Other offices provided anywhere

¹ Josie Gonzalez, "ICE Worksite Investigations: Regional Differences in ICE I-9 Audit Notices," American Immigration Lawyers Association Immigration Practice Pointers, 12th ed., pp. 327-330 (2011).

from four business days to 28 days to respond. Several ICE offices that set a three-day response deadline were inflexible in negotiating that period of time, despite the discretion to provide more than three days.

Requests for Documentation

The recent round of NOIs included a range of requests for additional documentation. Most NOIs included a subpoena with a significant number of additional requested documents. The most commonly requested documents were:

1. Copies of correspondence from the Social Security Administration, sometimes identified as “no match” letters;
2. A list of employees with Social Security Numbers, dates of birth and hire dates;
3. Quarterly tax statements, business information such as tax identification numbers; and
4. An indication of whether the company was enrolled in E-Verify or the Social Security Number Verification System.

Less commonly requested documents included:

1. Annual reports;
2. Electronic storage or I-9 generating system manual, policies or procedures;
3. Information about temporary staffing agencies used;
4. Identification of supervisors and managers; and
5. Notices from a U.S. Department of Labor I-9 NOI.

The types of documents requested varied significantly, even where they were issued by the same office and same Special Agent. For example, one agent requested a list of all current and terminated employees, including employees whose forms had been identified as deficient in a prior inspection. The same agent asked another company in the same state for a list of current employees, but included all employees on the payroll for the prior two years. The same agent requested IRS Form 941 from both companies, but was willing to substitute the most recent payroll register for one of the companies. The agent also asked one company, but not the other, for its most recent payroll register and copies of electronic storage/Form I-9 generating system manual, policies and procedures.

A few NOIs were accompanied by a business questionnaire, or in at least one case, a partial questionnaire. In addition, at least one agent provided an outdated version of the M-274 Handbook for Employers to the employer.

Conclusion

In the most recent round of NOIs, ICE requests and demands varied, even within a single office, with respect to the timelines provided for responding to the NOI, whether I-9s were requested for current and/or terminated employees, and the types of documents requested in the subpoena. ICE was also inconsistent from one office to the next in the agents’ willingness and flexibility to work with the employer to establish reasonable parameters for an inspection. Practitioners should read each NOI carefully and be aware that I-9 audits may contain inconsistent requests.