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A Double Whammy for California Employers: Heightened Immigration Investigations and New Fines

A new California law imposes new and different obligations on California public and private employers for immigration worksite visits, activities, and enforcement by federal government agencies. California's Immigrant Worker Protection Act (IWPA), which became effective on January 1, 2018, creates new fines for failure to comply with its obligations. The IWPA has already resulted in a substantial increase in government visits and audits. Over just three days in January, there were 77 investigations in Northern California alone.

Under this new law, in certain cases, California employers can be fined up to $10,000 per employee, regardless of whether the employee is an immigrant or not, when it reverifies an employee's authorization to work in the United States. California employers with employees on work visas (e.g., H1-B, L-1, etc.), in the event of a government site visit, are subject to new California restrictions. An audit, investigation, or Notice of Inspection (NOI) of the employer's I-9 Employment Eligibility Verification forms or work authorization records for any California employee now includes additional employer obligations. These new California obligations could appear to contradict federal law or guidance, create an obstruction of justice issue, cause confusion, or alter a California employer's best practices.

What Should California Employers Do Now?

To comply with the IWPA, a California employer should:

- Have a government visitor policy and review and amend it, if needed.
- Understand the law and, if needed, make a risk assessment before a visit by any government official.
- Review current employee notice practices.
- Review, and refresh if needed, its employment verification policy and process (including Form I-9, E-verify, and on-board) and conduct training. [1]

1 The employment verification (Form I-9/E-verify/on-board) policy and process should include very specific guidance on why, when, where, and how reverification is required and standardized communications. Inarticulate/informal communications or an amateur/shallow self-audit creates more legal issues than it resolves.

The IWPA does not define or limit the immigration agencies' worksite visits at issue. The Department of Homeland Security (DHS) and Department of Justice's Immigrant and Employee Rights Section are the primary agencies legally authorized to receive employment verification records and, as a result, are frequent visitors. The Office of Federal Contract Compliance Programs, Department of Labor, and U.S. Citizenship and Immigration Services (USCIS) are other visitors that may seek review of employee records of an immigration-related nature. Both the FBI and DHS's Homeland Security Investigations (HSI) make visits to employers for various reasons, including investigations of employees, employers, and independent contractors. Since the IWPA fails to define the specific agencies assigned with enforcement, employers must anticipate applicability of the obligations under the IWPA in a wide variety of circumstances.

What Can Employers Expect During an Immigration-Related Site Visit?

California employers may be fined ($2,000+) if during a site visit they provide a copy of an employee's pay stub to evidence the wages it has paid to a sponsored employee. California employers may be fined if they allow the government officer to enter a private workspace to meet with the sponsored employee or to see and/or photograph the sponsored employers' work space. This is true even if employers are only complying with the government official's request.

A site visit is a government official's surprise visit to the workplace to verify the employment of an employee on a work visa. The government official investigates the truthfulness behind the sponsored employment, including work location, salary, deductions, and job duties. Most site visits will include a request by the government agency to enter the private portion of the work location to photograph the sponsored employee's workspace. In addition, the government official may request that the employer share copies of the employee's paystubs or other documentation to evidence the payment of wages to the sponsored employee. However, even if the government official makes these requests, under the IWPA, employers may not consent without a warrant, subpoena, or court order. If the government officer has a warrant, subpoena, or court order, employers should cooperate with the government official.

If the government official does not have a warrant, subpoena, or court order, employers should consult with counsel on how to handle the government visit. Depending on the situation, it may be best to cooperate with the official as opposed to turning the government official away. If it is more beneficial to work with the official, then employers will want to ensure that their cooperation aligns with California and federal laws. If during the site visit facts relating to the sponsored employee's employment cannot be properly verified, the government agency will send a Notice of Intent to Revoke (NIR) that employee's work authorization.

What Can an Employer Expect During a Visit?

California employers should also be cognizant of visits from government officials conducting a Form I-9 audit. Government officials from DHS, USICS, and HIS may visit the premises after serving an NOI. This visit requires an administratively executed subpoena. While an immigration-related site visit is often limited to determining whether an individual on a work visa has a proper employment relationship, site visits about the Form I-9 relate to all employees.

During a Form I-9 audit, employers must produce all Form I-9s, E-verify forms, and other items listed on the subpoena for every current employee and certain terminated employees. This full production of original documents must be gathered, coordinated, protected, copied, and received by the U.S. government within three days. There are specific federal rules pertaining to NOIs and their related process. Employers are advised to seek counsel when being served with an NOI because they will be required to perform certain actions even after providing the requested documentation within the allotted time.

Employers may be fined for a multitude of reasons, including documentation errors, scope of the production, failure to review a worker's employment authorization or supporting documentation, failure to reverify an expiring work authorization, and having constructive or actual knowledge of a worker's lack of a valid work authorization. Violations stemming from an NOI include not only a range of civil fines but also criminal penalties and fines, including incarceration. In some cases, owners, managers, and

other human resources personnel have been indicted. California employers are subject to additional fines for failure to timely post a certain new employee notice,[2] failure to share certain documentation and/or requests with affected employees, and failure to address the employee's authorized representative.

How Can Reverification of an Employee's Work Authorization Be a Violation of California Law?

Perhaps most importantly, a California employer can be fined $10,000 per person if it reverifies or rechecks an employment authorization unless required to do so under federal law. Pursuant to federal law, a U.S. employer has a continuing obligation, through and post-employment, to maintain a Form I-9 record for each employee. An employer is required to reverify an employee's expiring work authorization on or before its expiration date. An employer may self-audit and may cure certain Form I-9 errors, and the curing of some errors requires participation of the employee. But a California employer's poor recordkeeping, insufficient self-audit practices, random practice of checking workers' documents, or failure to understand the employment verification/Form I-9 or E-verify process can easily give rise to this potential $10,000 penalty or a related investigation. Not only must an employer know the law but also be in the practice of promoting clear communication about immigration-related requirements with its employees. It is also important to not assume that the Automated Targeting System or any other electronic systems are fully compliant with all laws. These should periodically be reviewed by a professional third party for compliance.

2 Within 72 hours of receiving a Notice of Inspection, a California employer must notify each current employee of the inspection. Employers must post the notice in the language the employer normally uses to communicate employment-related information to the employee. By July 1, 2018, the California Labor Commissioner's Office will develop a template posting that employers may use to provide the notice. Until the template is distributed, employers should include the following information in the notice: (1) the name of the immigration agency conducting the inspections of I-9 forms or other employment records; (2) the date that the employer received the NOI; (3) the nature of the inspection to the extent known; and (4) a copy of the NOI of I-9 Forms for the inspection to be conducted.

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