

**Strafford**

*presents*

# **Employer Liability for Undocumented Workers**

## **Managing Risk and Avoiding Sanctions in an Era of Heightened Immigration Enforcement**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Mary E. Pivec, Partner, **Keller and Heckman**, Washington, D.C.  
Mahsa Aliaskari, Of Counsel, **Greenberg Traurig**, Santa Monica, Calif.  
Denyse Sabagh, Partner, **Duane Morris**, Washington, D.C.

**Tuesday, July 13, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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Please refer to the dial in/ log in instructions emailed to registrations.

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- closing the notification box
- and typing in the chat box your company name and the number of attendees.
- Then click the blue icon beside the box to send.

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- If you dialed in and have any difficulties during the call, press \*0 for assistance.

# Employer Liability for Undocumented Workers

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## Recent Developments in ICE I-9 Enforcement Policies and Procedures

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# The Advent of the ICE I-9 Forensic Audit Program: Auditors & Analytics

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**U.S. Immigration  
and Customs  
Enforcement**

## **Worksite Enforcement**

### **Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties**

**November 25, 2008**

## New Standard Fine Amounts For Substantive & Uncorrected Technical Violations

<b>% of I-9 Forms with Errors</b>	<b>First Offense \$110- \$1,100 @ Violation</b>	<b>Second Offense \$110- \$1,100 @ Violation</b>	<b>Third Offense \$110- \$1,100 @ Violation</b>
<b>0-9%</b>	<b>\$110</b>	<b>\$550</b>	<b>\$1,100</b>
<b>10-19%</b>	<b>\$275</b>	<b>\$650</b>	<b>\$1,100</b>
<b>20-29%</b>	<b>\$440</b>	<b>\$750</b>	<b>\$1,100</b>
<b>30-39%</b>	<b>\$605</b>	<b>\$850</b>	<b>\$1,100</b>
<b>40-49%</b>	<b>\$770</b>	<b>\$950</b>	<b>\$1,100</b>
<b>50% or more</b>	<b>\$935</b>	<b>\$1,100</b>	<b>\$1,100</b>

## New Standard Fine Amounts For Knowing Hire & Continuing to Employ Violations

% of UW's in Workforce	First Tier \$375- \$3,200 @ Violation	Second Tier \$3,200- \$6,500 @ Violation	Third Tier \$4,300 – \$16,000 @ Violation
0-9%	\$375	\$3,200	\$4,300
10-19%	\$845	\$3,750	\$6,250
20-29%	\$1315	\$4,300	\$8,200
30-39%	\$1,785	\$4,850	\$10,150
40-49%	\$2,255	\$5,400	\$12,100
50% or more	\$2,725	\$5,950	\$14,050

## New DHS/ICE CMP Enhancement Matrix

Factor	Aggravating	Mitigating	Neutral
<b>Business Size</b>	+5%	-5%	+/-0%
<b>Good Faith</b>	+5%	-5%	+/-0%
<b>Seriousness</b>	+5%	-5%	+/-0%
<b>Unauthorized Aliens</b>	+5%	-5%	+/-0%
<b>History</b>	<u>+5%</u>	<u>-5%</u>	<u>+/-0%</u>
<b>Cumulative Adjustment</b>	<b>+25%</b>	<b>-25%</b>	<b>+/-0%</b>



## Despite “New” Forensic Professionalism

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- ICE I-9 audit and violations standards are inconsistent
- New ICE regulations may redefine and limit the nature of substantive and technical violations
- DOJ withholding timely release of OCAHO employer sanctions decisions
- Future of administrative appeals in jeopardy

# Key Ancillary Enforcement Developments Yielding Uncertainty for Employers

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- **47 states have adopted immigration enforcement laws**
- **Unions and individuals have pushed back on employer attempts to resolve SSA No Match Letters – generating uncertainty and litigation**
- **Reinvigorated DOJ-OSC has vowed to protect workers from I-9 document abuse and E-Verify violations**
- **EEOC has threatened employers with pattern and practice suits for conducting background checks to detect identity fraud**
- **Nativists continue to bring Civil Rico class action suits predicated on criminal harboring theories**

# Managing risk through due diligence — Form I-9, Policies and Audits

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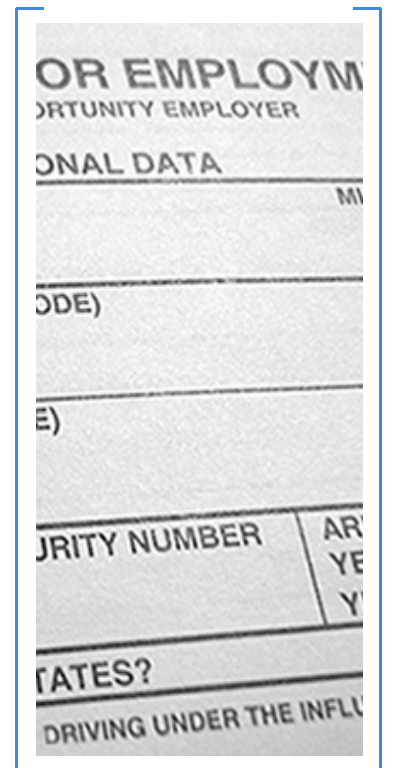
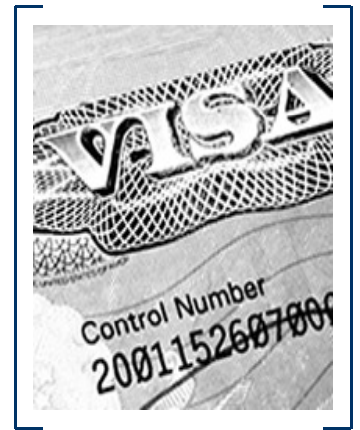
# Managing risk through due diligence — Form I-9, Policies and Audits

- **Key to Managing Risk:**
  - Implementing a Compliance Policy
  - Developing a Response Plan in Advance
  - Balancing compliance and realities of running a business
  
- **Why Compliance Matters**
  - Company Culture
  - Avoid or Minimize Monetary Fines
  - Ability to Remediate Past Mistakes
  - Current Government Focus on Employers



# Comprehensive Compliance

- How do you protect the company?
  - Put in place Best Practices
  - Conduct Annual Internal Audits
  - Establish a training program for Form I-9 compliance and fraud detection
  - Establish a Social Security No match Policy
  - Establish protocols and safeguards against discrimination
  
- What are the core elements of an effective compliance program?
  - To know what will be effective it is important to understand factors used to determine liability



## Factors that may affect penalties imposed (November 19, 2009 Guidelines)

- Good faith effort to comply, Company is trying!
- Employer history of violations
- Seriousness of violation
  - Intentional falsification
  - Deliberate refusal to prepare I-9 vs Negligent failure to prepare I-9
  - Partial preparation of I-9, but employee/employer not signing
  - Employer failure to sign
  - Improperly checked boxes
  - Untimely completion or inaccurate completion
  - Altered or backdated I-9
  - Employer's overall practice
  - Reasonable care and diligence
  - Presence of identity theft
  - Ongoing training and best practices
  - Audit clean up

# Best Practices: Internal Audit and Form I-9 Corrections

- **Constructive vs. Actual Knowledge**
  - It is unlawful to knowingly hire or continue to employ an unauthorized alien.
  - Constructive knowledge includes having information that would lead a person to reasonably conclude that person is not authorized to work in the United States
  - This may include, but is not limited to, situations where an employer:
    - Fails to complete or improperly complete the Form I-9
      - Limit & reduce liability through internal audit and corrections - if done properly

# Fails to complete or improperly complete the Form I-9

- What can be corrected and how?
  - Section 1
    - Common Issues
      - Information Missing: DOB, Address, SSN
      - Employee did not sign section 1
      - Employee information and/or signature entered in wrong field
      - There is no I-9 on file
      - Translator/Preparer
    - Is it a curable?
    - Who can make the correction?
    - Should the correction be made?
    - How should the correction be made?



# Fails to complete or improperly complete the Form I-9

- What can be corrected and how?
  - Section 2
    - Common Issues
      - List A, B, C document section not completed, completed incorrectly
      - DOH of hire not entered
      - Completed late
      - Left blank
      - Not signed or employer information missing/incomplete
    - Is it a curable?
    - Who can make the correction?
    - Should the correction be made?
    - How should the correction be made?

# Fails to complete or improperly complete the Form I-9

## ■ Other Issues

- Backdating
- Original Documents
- Continue to employ without reverifying his/her employment eligibility
- Overdocumentation
- Document retention - I-9s for inactive employees are retained for *3 years from the date of hire or 1 year from the date of termination, whichever is later*
- What is the company's tolerance?
  - Discovery of undocumented worker
    - What policies and protocols are in place?
    - What if the person has legalized?
- Contractors and Sub-Contractors
  - The Wal-Mart Model

# Avoiding Discrimination Claims

## When does or should the Office of Special Counsel become involved?

- “Citizen only” hiring practices
- Immigration law (IRCA) prohibits discrimination in hiring and discharging based on national origin or citizenship status
- Do Not use the I-9 process to pre-screen for hiring
  - However with consistency you may complete I-9s prior to payroll date
- If documents meet I-9 requirements, do not request additional or different documents unless the original documents do not appear facially valid
  - If documents do not meet I-9 requirements, request alternatives--and provide the list of eligible documents again

## Avoiding Discrimination - Basic Rules

- Employee should always be given the choice of what documentation to present
- Do not overdocument
- No prescreening
- Internal Audits and requests for corrections/updates
  - Is there a union?

# Defining the Universe of Who Must be I-9'd

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## Independent Contractor Issues

# Confronting the Independent Contractor Issue

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- IRCA prohibition on labor through contract
- Economic realities test will trump other factors
- DOL Misclassification Initiative
  - August 2010 – new recordkeeping rule mandating individualized determinations and disclosure to affected workers
  - Double teaming with ICE & State UI/WH regulators to identify violators

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# Electronic I-9s

# The Rule of Reason: Requirements for Form I-9 Electronic Retention Systems

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1. Reasonable controls to ensure the integrity, accuracy, and reliability of the electronic storage system;
2. Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9, including the electronic signature, if used;
3. An inspection and quality assurance program that regularly evaluates the electronic generation or storage system, and includes periodic checks of electronically stored Forms I-9, including the electronic signature, if used;
4. A retrieval system that includes an indexing system that permits searches by any data element; and
5. The ability to reproduce legible paper copies.



# Ice Forensic Auditors Love Electronic I-9s

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- No need to handle paper I-9s or data entry
- Ability to sort data and run liability reports instantly
- Ability to pinpoint identity theft and identity fraud within data base
- Easy detection of timing violations

## Matters to Consider Before Going Electronic

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- No DHS certified vendors
- Deficiencies in electronic I-9 system design, functionality, documentation and security may result in invalidation of employer's I-9s and loss of affirmative defense to alleged knowing violations
- Vendor error reports are not privileged
- Vendors may be unable to respond to 3-day NOI

## E-Verify Basics

- The best thing that is currently available
- Federal Contractors have been mandated to use E-Verify as the government claims it will lead by example and contracts awarded on or after September 8, 2009 are mandated to use the system and flow down the requirement
- State Laws

## Pros and Cons of E-Verify

### PROS: How does E-Verify help your business?

- Relatively easy system to use for new hires
- Free system to ensure businesses are not hiring undocumented workers
- Provides affirmative defense that the employer did not “knowingly” hire an undocumented worker
- Good PR - Clear message to the public: Company is socially responsible
- Photo Screening Tool- Assist in detecting document fraud
- Will improve as other biometrics are added

## Pros and Cons of E-Verify

CONS: What are the risks to enrollment?

- Not a "safe harbor" from worksite enforcement
- Agree to permit DHS and SSA to visit work sites to review E-Verify records and other employment records related to E-Verify
- Opportunity & Resource Costs
  - TIME : entering data, dealing with TNCs, finding replacement workers, E-Verify training
  - Cost estimates: \$9k per year for any company over 500 employees, or less than 1 percent of expected revenue for small entities -much higher
- Employers are bound by the terms of the MOU
- Discrimination suits based on improper application of E-Verify and MOU standards

The logo for Duane Morris, featuring the name in a white serif font on a dark blue rectangular background. The background of the slide is a light green with a subtle, abstract pattern of curved lines.

# Enforcement Efforts

## Form I-9 ICE Audits & Criminal Prosecutions

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# What Happens When ICE Initiates an Investigation?

- To initiate an investigation, an ICE agent will appear at the worksite in person and provide a company with several documents:
  - Notice of Investigation (NOI)
  - “Instructions on How to Prepare for an ICE Business Inspection”
  - Administrative Subpoena
- The NOI is the formal initiation of an investigation
- By law, a company has **three days** after the service of the NOI to produce the requested documents

## What Documents Will ICE Request?

- The “**Instructions on How to Prepare for an ICE Business Investigation**” sets forth a list of relevant documents ICE may seek during an investigation including:
  - Forms I-9 & Supporting Documents
  - Company Payroll
  - List of Current Employees
  - Business Entity Questionnaire/Employer Information Certification
  - Form DE-6 (Quarterly Wage & Withholding Report)
- **Administrative subpoena**
  - ICE has broad subpoena power
  - The subpoena lists the documents ICE requests to complete its investigation
  - The documents listed in the subpoena will likely include those listed in the Instructions



## Time to Collect/Correct/Request an Extension

- **Time to Collect:**

- By regulation, an employer has **3 days** after the issuance of the NOI within which to provide ICE with the requested documents

- **An employer can request an extension:**

- Respond promptly upon receipt of the NOI in writing to request an extension
- Extensions of time are discretionary

- **Corrections:**

- Any corrections should be conspicuously recorded, initialed, & dated with the notation “Per audit of [x] date”
- It’s never too late to complete or correct an I-9
- **Never** backdate
- Any changes to the attestation area (Box 1, 2, or 3) and signature and date areas must be made by the employee

## How Should I Respond to ICE's Request for Documents?

- **Forms I-9 are mandatory**
  - The Forms I-9 are the only documents required by law to be submitted to ICE -- ICE does not need a subpoena or a search warrant to compel the production of a company's Forms I-9
- However, ICE does have broad subpoena power to compel the production of other relevant documents
- The administrative subpoena is not self-executing, the government would need a federal judge to approve the subpoena in order to legally enforce it
- A court will enforce a subpoena if the documents requested are considered to be probative

## Cooperating with ICE

- It is recommended however, that a company cooperate with ICE's request for documents, including those listed in the administrative subpoena
- If a company is generally cooperative with ICE's request, then the company may be able to negotiate producing other sensitive business documents that have been requested (e.g., confidential records)
- Ultimately it is a judgment call, but keep in mind that ICE can ask a federal judge to enforce a subpoena, which may lead to substantial legal fees if it is challenged

## Mandatory Documents: Forms I-9

- **Acceptable format:**
  - Original paper copy
  - Electronic form
  - A paper copy of the electronic form
  - Or on microfilm or microfiche at the location where the request for production was made
- **Employer:** for current employees & former employees: 3 years after the date of the hire or one year after the date the individual's employment is terminated, whichever is later
- **Recruiter or referrer for a fee:** for current employees & former employees: 3 years after the date of hire
- **\*Recommended:**
  - Execute a "chain of custody" to confirm the number of Forms I-9
  - Make copies of all Forms I-9 for internal records

## What Should I Do About Social Security “No-Match” Letters?

- ICE may request copies of “no-match” letters in the subpoena
- “No-match” letters indicate that certain name and Social Security number information the employer has submitted does not match the information in Social Security Administration’s (SSA) database
- DHS issued a rule in 2007 providing that employers who fail to resolve Social Security mismatches may have constructive knowledge that those employees are ineligible for employment
- Shortly after the rule was finalized, a judge issued an injunction, preventing DHS from implementing the rule
- In October 2009, the DHS formally rescinded the rule
- Although the rule has not taken effect, companies may want to consider modeling their response to no-match letters after the “safe harbor provisions” included in the DHS rule

## Safe Harbor Provisions

### Within 30 days of receiving the no-match letter:

- Employer must check its records to determine if the mismatch was caused by clerical error

### Within 90 days of receiving the no-match letter:

- If the employee confirms the employer's information is correct, the employee must respond to SSA and resolve the matter

### Within 93 days of receiving the no-match letter

- If the employee cannot resolve the discrepancy within 90 days, the employer must try to reverify the employee's employment eligibility by completing a new Form I-9
- If a new I-9 cannot be completed because the employee cannot provide acceptable documentary evidence, then the employer must decide whether to terminate the employee or risk action by DHS

# What Happens After ICE has Received and Reviewed the Documents?

- **Notice of Technical Violations**
  - ICE notifies employer of technical or procedural violations
  - An employer has **10 days** to correct the errors indicated in the Notice
- **Notice of Suspect Documents**
  - Names of certain employees whose work authorization is suspect
  - The Special Agent in Charge (SAC) specifies a timeframe within which employers must contact the listed employees and submit the verifying documentation
    - Generally the SAC provides for a reasonable amount of time to investigate allegations
    - If the time period given is not reasonable, the employer should communicate with ICE to reach an agreement on a more reasonable timeframe
  - Without such proof, the employer must terminate employment or risk prosecution from ICE

# What Happens After ICE has Received and Reviewed the Documents?

## Notice of Discrepancies

- After a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine their work eligibility
- 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

## Warning Notice

- Review of Forms I-9 reveals overall compliance with only a few minor violations
- Generally issued without assessing any civil monetary penalties
- Will contain a statement of the basis for the violations and the relevant statutory provisions implicated (8 C.F.R. §274a.9(c))



# What Happens After ICE has Received and Reviewed the Documents? (cont.)

## Notice of Intent to Fine (NOIF), Form I-763

- Issued in response to a serious I-9 violation, a pattern of non-compliance, or if the employer fails to correct technical violations
- Contains the basis for the charge(s) against the respondent (employer), the statutory provisions alleged to have been violated, & the penalty that will be imposed

## What Should I Do if I Receive a NOIF?

1. Negotiate a settlement with ICE; or
2. Challenge the penalties imposed by requesting a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO) **within 30 days** of receipt of the NIF
  - If you file a timely request for a hearing, OCAHO will assign the case to an Administrative Law Judge
  - A Notice of Hearing (NOH) will be issued, setting forth procedural requirements for answering the government's complaint
- If the employer takes no action or if the written request for a hearing is untimely, **a final order will be issued 45 days** after service of the NIF

# Mitigating Factors for Reducing Fines

5 Mitigating Factors listed in 8 C.F.R. §274a(10)(1):

1. The size of the business of the employer being charged;
2. The good faith of the employer;
3. The seriousness of the violation;
4. Whether or not the individual was an unauthorized alien; &
5. The history of previous violations of the employer

# Standard of Procedure for Handling an Investigation

- **Have a plan and create a response team:**
  - Make sure to have a designated management representative to contact in the event that an ICE agent shows up at your place of business
  - Employees should not engage in conversation with the ICE agent and should immediately contact the designated management representative
  - The management representative should be cooperative with the ICE agent
  - The management representative should also contact the business owners and/or the company's attorney
  - Other response team members may include:
    - HR Representatives, Business Managers, IT Representative, Public Relations Specialist

## Criminal Prosecutions

- Audits may be relied upon to initiate a criminal prosecution of employers
- In 2009, ICE announced that it was “re-focusing efforts to develop criminal cases against employers who hire and use illegal workers”
- Since the new enforcement strategy was announced, there has been a dramatic increase in enforcement activity
- Individuals and/or the entity are subject to criminal prosecution

# Potential Criminal Charges

- **Pattern or Practice of Knowingly Hiring or Continuing to Employ Unauthorized Aliens** (8 C.F.R. §274a.10(a))
- **Bringing in and Harboring Certain Aliens** (8 U.S.C. §1324(a)(1)(A))
  - **Harboring** (8 U.S.C. §§1324(a)(1)(A)(i)-(iii))
  - **Encouraging or Inducing an Alien to Come to the United States** (8 U.S.C. §1324(a)(1)(A)(iv))
  - **Transporting an Undocumented Alien** (8 U.S.C. §1324(a)(1)(A)(ii))
  - **Aiding & Abetting or Conspiracy to Commit Any Offense Mentioned Above** (8 U.S.C. §1324(a)(1)(A)(v))
  - **Knowingly Hiring an Undocumented Alien** (8 U.S.C. §1324(a)(2))
- **Money Laundering** (18 U.S.C. §§1956 & 1957)
- **Fraud** (18 U.S.C. §1028)
- **Tax Evasion** (26 U.S.C. §7201)

## Criminal Asset Forfeiture

- A separate count considered by the jury
- Government can confiscate assets either determined to be proceeds of crime or funds and property used to perpetuate criminal activity
- Types of property subject to seizure:
  - Vehicles
  - Plant & Equipment
  - Bank Accounts

(18 U.S.C. §982)

# Examples of ICE Investigations that have Led to Criminal Prosecutions:

## 1) Restaurant Owners Convicted in 2009:

- 2 owners of Chinese restaurants in Illinois convicted of tax evasion, harboring, & hiring undocumented employees
- Employed undocumented employees, provided housing for them, represented partial payment of wages, arranged for transportation of undocumented employees, failed to report cash receipts
- Punishment: 16 months in prison, \$6,000 fine, \$78,000 forfeiture, \$228,238 in restitution

## 2) Owner of Timbuktu Restaurant Convicted June 2010:

- Harboring undocumented employees for private financial gain and commercial advantage
- Provided housing to undocumented employees, paid employees in cash, failed to respond to SSA no-match letters of employees
- Facing a maximum sentence of 10 years in prison, \$378,386.21 forfeiture, \$99,890 seized, and a 2009 Harley Davidson



# Overview of an ICE Investigation

