

# **Immigration Compliance:**

**I-9 Violations; Self-Audits;  
Correcting Errors on I-9 Forms; *and*  
Employee with New Identity Issues**

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Presented by:  
**Bruce E. Buchanan**



**Siskind Susser, P.C.**  
2300 21<sup>st</sup> Ave. South, Suite 201  
Nashville, TN 37212  
☎ (615) 345-0266  
✉ [bbuchanan@visalaw.com](mailto:bbuchanan@visalaw.com)

# ICE Statistics – FY 2014

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- ICE inspected **3127** employers, **up 600%** from FY 2008;
- ICE issued **637** final Orders to Employers for fines of **\$15.8 million**;
- ICE charged **452** individuals, including managers/owners of companies, with criminal immigration violations;
- ICE debarred **227** businesses.

# Examples of Substantive Violations

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1. Failure to prepare I-9 form;
2. No status box checked or more than one box checked;
3. Failure of employee and/or employer to sign;
4. A # missing altogether;
5. Failure to list any information in Lists A, B, or C, OR listing only partial information in Lists A, B, or C with no legible copy of document attached to I-9; &
6. Untimely preparation of I-9 form.

# Penalties for Violations

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- \$110 - \$1,100 per I-9 form (depending on percentage of violations) for substantive or uncorrected technical violations;
- Level of penalty is based as follows:
  - 0 - 9% - \$110      30-39% - \$605
  - 10-19% - \$275      40-49% - \$770
  - 20-29% - \$440      50% or more - \$935

# Mitigating/Aggravating Factors

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- Mitigating/aggravating factors which cause 5% increase or decrease in penalties:
  - Size of business;
  - Good faith/bad faith;
  - Seriousness of violations;
  - Employment of unauthorized employees; &
  - History of prior violations.



# Cost of I-9 Violations

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- In 2014 and 2015, OCAHO has issued decisions assessing these penalties:

M&D Masonry - **\$228,000**

Speedy Gonzalez Construction - **\$97,000**

Durable, Inc. - **\$330,000**

ESSG II - **\$227,000**



# Technical Violations

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- For technical violations, employer gets 10 days after notice by government to correct violations;
- Types of technical violations:
  1. Home address or DOB of employee not listed;
  2. A # missing in Section 1 but listed in Section 2 or on legible copy of document;
  3. Some information missing in Lists A, B or C, such as expiration date, but listed on legible copy of document attached to I-9 form; &
  4. Business name/address missing.

# **Penalties for “Knowingly” Employing, Hiring Undocumented Workers**

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- \$375 - \$16,000 for “knowingly” employing or hiring each unauthorized worker (depending on first offense or subsequent offenses);
- Government may also seek criminal sanctions, including fines, forfeiture of assets, and imprisonment, against employers and/or management officials or owners.



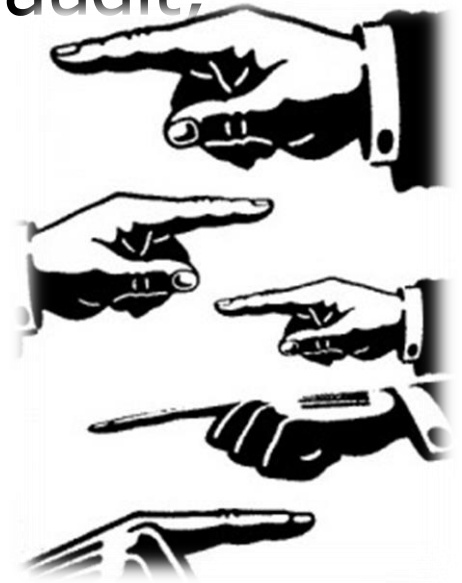
# Why Should a Company Perform an I-9 Audit?

- If ICE serves a NOI/subpoena, it is likely to find substantive errors and assess penalties;
- Even for small companies, penalties can be over **\$50,000**;
- NOIs can be disruptive to your company;
- Attorney's fees may be greater during NOIs than when supervising/conducting self-audits.



# Use of Immigration Attorney During Self-Audit

- If employer decides to self-audit without immigration compliance counsel, these issues may arise:
  - Person who initially filled out Section 2 may be the one performing audit;
  - Person may not be trained on how to correct errors;
  - May not be correct person and/or following proper procedure to correct errors.



# **Use of Immigration Attorney During Self-Audit (cont'd)**

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- ICE has described the following problems with self-audits by non-attorneys:
  - Redoing all I-9 Forms and throwing away originals;
  - Separating copies of supporting documentation from I-9 Forms and throwing them away;
  - Making changes to I-9 Forms without initialing and dating the I-9 Forms; and
  - Inserting backdated information in I-9 Forms making them appear to be timely completed.

# Self-Audits Include I-9 Compliance Policy

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- Audit of I-9 forms should include drafting of immigration compliance policy which covers:
  - Who is in charge of immigration compliance?
  - Does company retain supporting documentation?
  - Does company use E-Verify?
  - Is company required to use E-Verify by state law or FAR E-Verify?
  - Contain rules for working with sub-contractors.
  - Have zero tolerance policy for employment of anyone who can't comply with IRCA.
  - Contain rules on who has access to I-9 records.
  - Outline re-verification procedures.



# Retention and Reverification

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- Retention - must maintain I-9 forms of former employees for longer of 3 years from date of hire, or 1 year after employee's employment ends;
- DO NOT re-verify these IDs even if they expire after the worker is hired:
  - Permanent Resident cards
  - US Passports
  - Driver's licenses/State IDs



# Correcting Errors on I-9 Forms


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- If errors are found on I-9 forms, they should be corrected;
- Be careful to understand how to correct errors;
  - Section 1 errors by employee;
  - Section 2 and 3 errors by employer;
- For changes in Section 2 by employer, it should be the individual who originally reviewed documents and signed certification; and
  - If that person is no longer employed & there are many corrections, it is best to complete a new I-9 form.

# Correcting Errors (cont'd)

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- **The best way to correct an I-9 form:**

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- Draw a line through the incorrect information;
  - Enter the correct information; and
  - Initial & date the correction in different color pen.

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- DO NOT backdate I-9 Form;
  - DO NOT discard old I-9 Form if used new I-9 Form to correct errors.

# Correcting Errors (cont'd)

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- Be sure NOT to conceal any changes made on the form;
- DO NOT use "whiteout";
- If you have made changes on I-9 form using "whiteout", attach a signed and dated note to the corrected Forms I-9 explaining what happened.



# Correcting Errors (cont'd)

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- If I-9 form is missing data, such as title of document or expiration date of document:
  - Add information to existing I-9 form, initial and date addition in different color pen.
- If put information in the wrong list, i.e., put Social Security information in List B or driver's license in List C, draw arrow to correct List, initial and date.

# Correcting Errors (cont'd)

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- Do not put information in List B or C if already filled out List A and vice versa;
- This is **over-documentation**, which could trigger an investigation by the Office of Special Counsel (OSC) for document abuse and OSC could fine the company;
- If too much information filled out in Lists A, B and C, cross-out the unneeded information, initial and date in different color pen.



# Correcting Errors (cont'd)

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- To correct **multiple errors** on I-9 form, you may redo the section on new I-9 form and attach it to the old form;
- New I-9 form can be completed if major errors (i.e., entire sections being left blank or Section 2 being completed based on unacceptable documents) need to be corrected; and
- Note should be included re: reason you made changes to existing I-9 form or completed a new I-9 form.

# Employee Presents a New Identity

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- **Scenario:** Current employee presents EAD;
- Employee previously provided different name, Juan Alvarez, SSN, Alien # on green card or EAD, and/or SS card.
- You inquire why the change in name, number, etc.
- Employee informs you that new EAD is valid with correct name, Jesus Diaz, and received it through DACA.

# Employee Presents a New Identity (cont'd)

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- Thus, you know that previous document(s) were fraudulent as well as he lied on his I-9 form, and job application.
- *What should an employer do in this situation?*

# **Employee Presents a New Identity**

## **(cont'd)**

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### **There are several options:**

- (1) Accept the new document(s), EAD, SS card, etc., have a new I-9 form filled out or Section 3 of old I-9 form if information in Section 1 is unchanged (unlikely), and attach the old I-9 form to the new one with an explanation of the circumstances.
- USCIS issued Guidance after DACA was implemented, in which it offered the above as its guidance. However, OSC has issued guidance which states an employer may terminate or keep an employee as long as employer is consistent under "dishonesty policy."
- However, USCIS did not discuss whether company has dishonesty policy.

## Employee Presents a New Identity (cont'd)

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- **(2)** Inform the employee that your company has a policy prohibiting employment of employees who have presented fraudulent documents or lied on a company document;
  - However, if the company does not have a policy prohibiting their re-hire, it may offer to re-hire the employee and fill out a new I-9 form with an explanation of the circumstances.



## Employee Presents a New Identity (cont'd)

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- **(3)** Inform the employee that your company has a policy prohibiting employment of employees who have presented fraudulent documents or lied on a company or government document and that employee is not eligible for rehire.
  - Thus, the employee must be terminated without a chance of rehire. This action may be the only act for an employer if it wants to remain consistent with its policy.

# Employee Presents a New Identity (cont'd)

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- The option that a company chooses will be dictated by your company's policy and/or practice;
- Always be consistent in your practices. If you retained employee, who falsified material information on their application, then you may have to retain employee with new name, EAD, etc. to be consistent with practice;
- **If you don't have a policy** concerning employment of employees who have presented fraudulent documents or lied on a company document, you should consult with an employment/immigration compliance attorney to develop a policy that addresses this situation.



# Bruce E. Buchanan

Bruce E. Buchanan is an attorney at the Nashville and Atlanta offices of Siskind Susser P.C. He represents employers in immigration matters, with a special emphasis on immigration compliance, and in employment law matters. He received his J.D. from the Vanderbilt University. Before going into private practice, Bruce served as senior trial specialist for the NLRB for 20 years. He also served from 1991 to 2003 as Adjunct Law Professor at William H. Bowen UALR School of Law.

Bruce blogs for <http://blogs.ilw.com/blog.php?29223-I-9-E-Verify-Immigration-Compliance> and LawLogix's I-9 and E-Verify blog, <http://www.lawlogix.com/blog>, and is a regular contributor to *HR Professionals Magazine* on immigration compliance issues. He is editor of TBA's *Immigration Law Section Newsletter* and *Labor and Employment Law Section Newsletter*.

Bruce is admitted to practice in Tennessee, Florida, Georgia, and Arkansas, and U.S. Court of Appeals for 5th, 6th, 8th, and D.C. Circuits.