

MODERN RESTAURANT MANAGEMENT



Preparing Your Restaurant for When ICE Comes Knocking

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Ok, let's be honest. Immigration and Customs Enforcement ("ICE") does not knock. They just show up. With the Trump Administration's aggressive push toward dealing with undocumented immigrants in the workforce, restaurant owners and operators can expect ICE to show up at their establishments more frequently than in prior years.

With a large amount of relatively low-skilled workers and a high-turnover rate, combined with record low unemployment, the hospitality industry generally, and restaurants specifically are ripe targets for ICE I-9 audits. This article will discuss the various scenarios your restaurant potentially faces when ICE does show up, as well as compliance advice.

The Notice of Inspection

ICE serves your establishment's business owner or manager with a Notice of Inspections by hand, demanding an employer to produce its original I-9 forms and payroll records and a complete a required questionnaire. The questionnaire seeks information about the hiring practices and ownership of the target business. While the law gives business owners three days to produce documents, ICE auditors frequently grant an extension of time to produce the original I-9s and copies of payroll records or journals.

Violations: Technical and Substantive

Once they get their hands on the records, ICE auditors look for two different kinds of I-9 violations: technical and substantive. Technical violations are trivial and are usually nothing more than an error in filling out the form. According to the I-9 instructions, the employee completes and signs section one, and presents his or her documents. A representative of the employer completes section two of the form recording the documents the employee presented. Technical violations include leaving a box blank, or ticking the wrong box such as a US citizen employee indicating that he or she is a US national.

Another frequent technical violation is use of the wrong edition of the I-9 form as the Department of Homeland Security ("DHS") regularly updates the form. Additionally, DHS publishes a Spanish language version of the I-9 form for use by employers in Puerto Rico. All other US employers must use the English language version of the I-9 form. Fines for technical violations are in the hundreds of dollars, so it is common that some auditors that find only technical violations issue a Notice of Technical or Procedural Failures and permit an employer to correct their I-9 forms without paying a fine.

ICE will accuse an employer of a substantive violation if it finds an unauthorized worker on the employer's payroll or a worker on the payroll for which there is no I-9 form. ICE runs the names, dates of birth, social security numbers, and alien registration numbers from the employer's I-9 forms and payroll journals through their records. If the data does not match, employers face fines in the thousands of dollars per employee.

ICE also pays attentions to dates. While employers may ask employment applicants if they are employment authorized in the United States, the law forbids verifying the employment eligibility of a prospective employee until after extending an offer of employment. Employers must verify the employees' right to work within three days of reporting to work. If ICE sees employees completing I-9 forms outside of this window, it will assess a substantive violation or refer the employer to the Department of Justice' Office of Special Counsel for additional scrutiny.

Another date ICE tracks is expiration dates. Every document presented to an employer in the employment eligibility process must be valid or unexpired. ICE will mete out a violation if they find that an employer accepted an expired document as evidence of employment eligibility. ICE also looks at the expiration date of employment authorization cards and employment authorized visa holder. Employers do not need to track the expiration dates of the employment eligibility documents of Lawful Permanent Residents or US citizens. However, if an employer continues to employ the holder of an Employment Authorization Card or nonimmigrant working visa after the expiration of the visa or card, ICE will find that the employer has knowingly employed an unauthorized individual

Basic Training

Successfully navigating an I-9 audit requires planning and implementing sound employment policies long before ICE shows up. It is important for employers to have a systematic process in place to collect a completed I-9 form from new employees. I-9 records should be stored separate from personnel files preferably in a centralized location. Additionally, employers should track the expiration dates of all Employment Authorization Documents presented as evidence of employment eligibility. Employers should, request updated documents from EAD cardholders and terminate those that do not provide updated evidence of employment authorization. Finally, employers should regularly purge I-9 forms that they are no longer mandated to keep.

To Photocopy or not to Photocopy

When Congress wrote this law, they understood that employers are not immigration officers, and are not required to detect fraudulent employment or identity documents. The law requires an employer to accept employment authorization documents that reasonably appear to be genuine, and does not require an employer to make photocopies of the documents employees provide to establish employment authorization. The advantage to making photocopies is that an auditor examining an I-9 will also examine the copy of the document. Typographical errors on the I-9 forms will likely be viewed as technical violations. For example, if an employee writes the wrong social security number on the form but the employer copies the card, the auditor will run both numbers through their system in an attempt to ascertain the employee's status. ICE will find a technical but not substantial violation if either of the social security numbers matches its records.

The disadvantage of photocopying and producing the employee's documents is that an employer surrenders a powerful defense against an allegation of employment of an unauthorized individual: the Safe Harbor provision. As mentioned above. The law requires an employer is required to accept a document that reasonably appears to be genuine. An employer's judgement as to what a reasonably genuine document looks like becomes an issue in the audit if the employer makes and produces copies of the employee's documents.

Electronic I-9

Immigration service regulations permit employers to collect and store I-9 information electronically. There are great advantages to electronic I-9 storage for large employers. ICE demands the production of the original paper I-9 form the employee fill out during onboarding. With an electronic I-9 management system, employers no longer have to chase down paper I-9s to produce for the auditor. The employer hands over a USB stick or CD with the I-9 data on it. Additionally, when used in conjunction with human resources management software, electronic I-9 management systems automatically purge I-9 data from an employer's system. Employers should regularly audit their system to be sure that it can produce I-9 data in the event ICE shows up. In November of 2008, clothing retailer Abercrombie & Fitch's I-9 audit resulted in a million-dollar fine. ICE concluded that A&F did not have I-9 records for their employees because they were not able to retrieve I-9 data from their computer system.

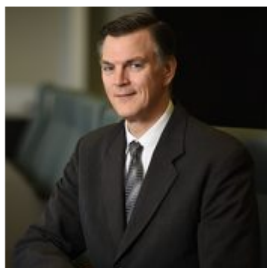
E-Verify?

Launched in 1996, E-Verify is a project between DHS and the Social Security Administration to detect and prevent the employment of unauthorized individuals. Unless mandated by state law or specifically agreed to in a contract, an Employer's participation in E-Verify is voluntary. E-Verify is not a substitute for the I-9 process. Participation in E-Verify does not relieve an employer of its legal obligation to collect and keep an I-9 form for every employee. The advantages to E-Verify is that an employer gets a peek into the database ICE uses in an audit. E-Verify tell an employer if it confirms the identity and employment authorization of its newly hired worker. Some employers use their status as an E-Verify employer in its marketing campaign.

The disadvantage to E-Verify is the administrative burden of training and tasking an employee to administer the system. Larger employers that utilize human resources software may take advantage of E-Verify integration. Their data is automatically submitted to E-Verify. Another disadvantage of E-Verify is that along with its employee's information, employers communicate their hiring practices to DHS via E-Verify. In anticipation of finding, many unauthorized employees its payroll, ICE may audit an E-Verify employer that hires more EAD cardholders than average or receives a greater number of unconfirmed employees than average.

Conclusion

ICE is looking for undocumented workers in restaurants. With planning and implementing sound employment policies, a restaurant can be ready for when ICE knocks on their door.



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