

2019 I-9 COMPLIANCE AND STRATEGIES FOR AGRICULTURAL EMPLOYERS

Anthony P. Raimondo, Esq.

Raimondo & Associates

(559) 432-3000 (office) (559) 801-2226 (cell)

apr@raimondoassociates.com

Disclaimer

The following presentation contains general information and is provided as a courtesy to our clients and friends. It should not be relied upon in any particular factual situation without consulting your legal counsel for specific advice.

WHAT IN THE HECK IS GOING ON?



ICE ACTIVITY IN 2018

- Worksite enforcement is on the increase:
- ICE arrested 364 individuals during 30-days of enforcement visits in the midwestern states of Illinois (134), Indiana (52), Kansas (43), Kentucky (60), Missouri (42), and Wisconsin (33).
- ICE conducted a worksite visit at a business in Texas with 500+ employees and arrested ~160 foreign nationals. In 2014, the employer had paid a \$445,000 fine for hiring individuals without proper work authorization.
- Asplundh Tree Expert Co. was ordered to pay a record \$95 million last year for hiring workers who were in the U.S. illegally
- ICE served search warrants at various businesses in Nebraska and Minnesota resulting in the apprehension of 133 foreign nationals this summer.
- In June 2018, 200 federal officers raided an Ohio gardening and landscaping company, arresting 114 foreign nationals suspected of being in the U.S. without lawful status. ICE also obtained volumes of business records to investigate and determine whether to file charges against the business.

ICE ACTIVITY IN 2018

- Worksite enforcement is on the increase:
- In April 2018, 97 foreign nationals working at a meat processing plant in Tennessee were arrested on federal and state charges. This was a joint operation between the Homeland Security Investigations arm, the Internal Revenue Service, and the Tennessee Highway Patrol. The government opened a case to investigate the business after the employer's bank noticed large sums of money being withdrawn every week, supposedly to pay the unauthorized workers in cash. The IRS alleges that the business failed to report \$8.4 million in wages and failed to pay at least \$2.5 million in payroll taxes.
- In January 2018, ICE raided nearly one hundred 7-Eleven stores in 17 states and D.C. to issue Notices of Inspection and interview employees. The investigation led to 21 arrests. ICE stated that this should be a clear message to employers who hire foreign nationals without proper work authorization. ICE stated this raid was a follow-up enforcement operation on a 2013 raid where nine 7-Eleven owners and managers were charged with various crimes, including conspiring to commit wire fraud, stealing identities, and concealing and harboring undocumented individuals employed at their stores.

What comes next?



Nobody Knows.

Enforcement Tools

■ Workplace Raids

- Primary tool of the Bush administration.
- Results in disruption of business, and arrest/flight of workforce
- Little action under Trump

■ I-9 Audits

- Primary tool of the Obama Administration.
- Looks for paper violations. Employees may lose jobs, but rarely arrested.

AB 450

- Requires employers to ask immigration agents for a warrant before granting access to a worksite.
 - **Legal Guidance:** *Remember, immigration agents almost never show up and demand broad access without a warrant. When they do so, they will likely have a justification such as hot pursuit or some other emergency circumstance that eliminates the need for a warrant, and employer consent is a non-issue. The odds are very low that an employer will ever face the threat of a warrantless search by ICE that relies on employer consent for access. If such a circumstance arises, the employer should express a desire to cooperate, but a need to avoid fines under state law, and should ask the agent to obtain a subpoena or warrant.*

AB 450

- Prevents employers from voluntarily sharing confidential employee information without a subpoena.
 - **Legal Guidance:** *Under existing law, employers must generally avoid sharing confidential information without a subpoena. Typically, ICE does not need subpoenas, as the documents they ordinarily seek are I-9s, which they are entitled to audit. If ICE has a broader document request, express a desire to cooperate, explain the state law, and ask them to provide a subpoena.*
- Requires employers to notify their workers before a federal audit of employee records.
 - **Legal Guidance:** *This is the most dangerous part of the law, because it can trigger employee flight that damages the business, and can needlessly frighten employees. This requirement will be discussed in further detail below.*
- Gives the attorney general and labor commissioner exclusive authority to enforce new provisions of state labor laws.

AB 450

- Prohibits employers from re-verifying information on employment verification forms, unless compelled to by federal law.
 - **Legal Guidance:** *Employers can only re-verify under limited circumstances already, and federal law outlines the circumstances in which they can do so.*
- Remember!
 - Seasonal employees who return year after year may not need a new I-9.
 - Employees who leave and are rehired within 3 years of their I-9 can rely on their original I-9
 - Permanent Resident Alien Cards do not need to be reverified on expiration! (But must be current on hire)

New I-9 Form Issued

- Dated 7/17/2017
- New M-274 issued as well
- Instructions clarify a number of issues, such as re-verification of expired PRA cards.
- Spanish I-9 for Puerto Rico ONLY!

IMMIGRATION LAW – EMPLOYER OBLIGATIONS

- It is unlawful for any person or entity to hire (or recruit or refer for a fee) an alien for employment in the United States knowing that the alien is not authorized to work in the United States.
- It is also unlawful to continue to employ an alien while knowing that the alien is, or has become, unauthorized for employment.
- An employer has an affirmative defense if it complies in good faith with the verification process set forth in the statute, typically referred to as the I-9 process.
- “**KNOWLEDGE**” indicates not only actual knowledge but also “**constructive knowledge**”
 - Constructive knowledge is awareness of certain facts or circumstances that would lead a person exercising reasonable care to know about a certain condition. Constructive knowledge that an employee is not authorized to work includes, but is not limited to, circumstances where an employer fails to complete the I-9 form, has information available to it that would indicate that a person is not authorized to work, or acts with reckless and wanton disregard for the legal consequences of allowing another individual to introduce an unauthorized alien into its work force or to act on its behalf.
- Knowledge that an employee is unauthorized may not be inferred from an employee’s appearance or accent, nor may it be inferred from mere suspicions or rumors.

IMMIGRATION COMPLIANCE PROTOCOL

- Be certain you have completed I-9 forms for all new hires, including U.S. citizens.
 - Make sure that all staff who process new hires are trained to properly complete the I-9 process.
 - Periodically audit I-9s to make sure they are properly processing new hires. Incomplete or improperly completed I-9 forms will result in exposure to liability!
- Complete the forms at the same point in the employment process for all employees - after you have made the decision to hire the person.
- Be certain you keep I-9 forms on file for three years after the date of hire or for one year after termination of employment, whichever date is later.

IMMIGRATION COMPLIANCE PROTOCOL

- Have a knowledgeable designated representative in place who is authorized to meet and talk with ICE personnel. Make sure that the representative knows when to contact the company's attorneys and owner(s).
- Educate your employees to refer ICE or other government inquiries to your designated company representative.
- All employees must be trained to inform ICE agents that the Company has a standard protocol implemented by legal counsel, and that the agents need to wait for the designated person to follow through on that protocol.
- Keep I-9s separate from other records so you can produce them easily.
- Do you copy employee documents? If so, you must provide them.

I-9 COMPLIANCE

- Section 1: **MUST** be filled out by the employee before performing any work. The preparer/translator certification must be signed by anyone who assists. **The employee is not required to provide their SSN.**

- Section 2 (document verification): Must be completed within 3 business days of starting work.
 - Make sure all new hires are provided with a copy of the list of acceptable documents that is on the back of the I-9 form.
 - The same person who sees the documents must sign the certification
 - Record ALL document information

- Documents must be originals that “reasonably appear genuine on their face.” **If so, they must be accepted.**
Employers cannot specify which documents to produce.

I-9 COMPLIANCE (DOCUMENT VERIFICATION)

- Make sure the employee presents **ORIGINAL** documents. Copies are not acceptable!
- **The law does not require you to copy employee documents!** If you keep copies, you are giving ICE an opportunity to second guess your judgment on whether the document appeared genuine – except that ICE will be looking at a COPY when you were looking at an original. Copies are often of poorer quality than originals, and may not look the same. Whoever fills out the I-9 for the employer has to certify that the documents appeared genuine under penalty of perjury, and that is enough.
- Employees must produce **1 document from List A, OR 1 from List B AND 1 from List C.** Make sure you know the difference between them, and the purpose for each. List A documents prove identity AND authorization to work. List B documents prove IDENTITY ONLY. List C documents prove work authorization, but do not show identity.
- Errors, typos, and white-out – let your mistakes be seen. There is no reason to make ICE suspicious about what you might have blacked out.

LIST A DOCUMENTS (Most Common Examples)

- List A documents show identity and authorization to work – this is all that is needed
- Examples:
 - U.S. Passport
 - Permanent Resident Alien Card (I-551)
 - Foreign Passport with I-551 stamp
 - Temporary I-551 immigrant visa with photo
 - Must be reverified on expiration
 - Temporary Employment Authorization with photo (I-766)

List B Documents (Most Common Examples)

- List B Documents show Identity only
- Examples:
 - Drivers' license (including Canada)
 - State issued ID card
 - School ID
 - Military ID (or other federal ID)
- For Minors:
 - School report card
 - Medical record
- Mexican consulate ID is NOT acceptable

List C Documents (Most Common Examples)

- List C documents show work authorization **ONLY**
- Examples:
 - Social Security card (cannot be laminated)
 - Certification of foreign birth (Must have a raised seal)
 - Certificate of Birth Abroad
 - U.S. Birth Certificate – must have original seal
 - INS citizen I.D. cards (I-197 and I-179)
 - No longer issued, but still valid

**ALL NEW HIRES MUST BE
GIVEN THE LIST OF
ACCEPTABLE DOCUMENTS!**

**YOU CANNOT REQUIRE AN
EMPLOYEE TO PROVIDE A
SOCIAL SECURITY CARD!**

I-9 COMPLIANCE

- **Document Abuse:** Absent a legitimate reason for requesting additional documents or refusing to honor tendered documents, a discriminatory purpose will likely be inferred.
- **Reverification:** If an employer has information available to it indicating that an employee is not authorized to work, there is a duty to inquire further about the employee's status, but the employer must be careful to avoid committing an unfair immigration related employment practice. An employer may inquire further by requesting more or additional verification documents without risking charges of document abuse when reliable information arises suggesting that an employee is not authorized to work. If an employer receives a mismatch notice and the employee used an SSN for List C on the I-9, it should reverify the I-9 without using the questionable SSN.

MAKE SURE YOU SIGN AND DATE IN EVERY PLACE THAT IS REQUIRED

Did the employee date their signature?

Does your certification have the first
day of work?

Did you date your signature?

SSN MISMATCH

- Current Status: No Match Letters suspended since January 2012
 - But could resume at any time.

- What is it?
 - Notification of mismatch between name and SSN.

- Why do we care?
 - ICE wants to use this as a basis to show constructive knowledge that a person lacked legal status.

- Why are we talking about it if they are suspended?
 - Mismatches can arise in a number of ways, including garnishments, third party questions about earnings, health insurance providers, and others.

SSN MISMATCH

■ IF YOU RECEIVE A NO MATCH LETTER:

- **Verify Your Records:** Compare the employee's SSN with your records. If your records do not match the W-4 form, then correct the W-4 form and report the correction to the SSA. Maintain copies of correspondence submitting corrected information to the SSA. ICE says no less than 30 days – you should do it in 15.

- **Notify the Employee of the Discrepancy:** If checking your records shows you have been reporting the number as provided by the employee, then inform the employee that the SSA has notified you of the problem and that he or she must resolve it with the SSA. Tell the employee to report the correct information to you once it has been resolved with the SSA. While not required, you should impose a deadline that allows a reasonable amount of time to resolve the problem (90 to 120 days), as the employee may need to obtain a new Social Security card.

SSN MISMATCH (CONT.)

- **IF YOU RECEIVE A NO MATCH LETTER (CONT.):**
- **Confirm your Instructions in Writing:** Write a letter directing the employee to resolve the issue with the SSA and asking the employee to provide updated information, and include it with the employee's pay check. Retain a copy of the letter for your records. Maintain a list of the names of employees who received the written instructions. Remember, you must continue to pay payroll taxes for each employee, regardless of any mismatch.
- **If the employee returns with new information,** correct your payroll records and send a letter to the SSA notifying the agency of the correction.
- **If the employee returns with information that could indicate a lack of work authorization** (i.e., a new name and/or SSN), then you may need to follow up further to avoid having "constructive knowledge" of the lack of authorization. A new Alien Registration number should be considered suspicious.

- **If the employee does not return with corrected information**, do not automatically fire the employee or reverify their authorization to work in the United States. Warn them that termination may follow if they do not respond in 90 days, then suspend without pay with a warning that termination will follow if the issue is not resolved in 30 days.

- **If you choose not to impose a deadline, and do not receive corrected information by the end of the tax year**, send a letter to the employee stating as follows:
 - “On [date], we notified you that the Social Security Administration had advised us of a name/number mismatch in the agency’s records of your account. We suggested that you go to the local SSA office to straighten out the problem. Please let us know if any of the information in our records needs to be changed.” Enclose a W-4.

 - Send another letter with the same warning should be sent at the end of the next tax year if the employee does not provide corrected information. Once you have requested the update in two successive tax years, you do not need to ask again. As a matter of policy, having employees submit a new W-4 on an annual basis will serve as an annual solicitation for their correct SSN.

ICE VISIT PROTOCOL

- No management employee should submit to an interview or provide documents to the ICE or other government agency without first conferring with your designated company representative.
- WHEN ICE SHOWS UP: Determine who the investigators are. Ask for a business card. Make sure they really are with ICE. Contact your attorney immediately.
- Find out why the investigators are there.
 - RAID: Generally requires a search warrant, and no advance notice.
 - I-9 AUDIT: Requires three days' advance notice in writing – Even if the audit is part of a DOL drop in inspection – Always demand 3 days notice before showing anyone the I-9s. No search warrant.

ICE VISIT PROTOCOL

- Stay calm.
 - Be polite no matter how you feel. Losing your temper will only make matters worse. Don't refuse or delay providing documents you are legally required to provide.

- Don't forget you can ask for time to compile the records requested by ICE agents. Don't allow documents to be removed from your property without making copies, and don't turn over more documents than the law requires.
 - If, while preparing for the audit, the employer discovers errors on I-9s or missing forms, it should not correct the errors prior to the audit. Federal regulations allow employers 10 business days after notification of a technical error on the I-9 to correct the error, and most minor technical problems can be corrected during this period. If an I-9 is missing altogether, then the employer should immediately have the employee complete an I-9.

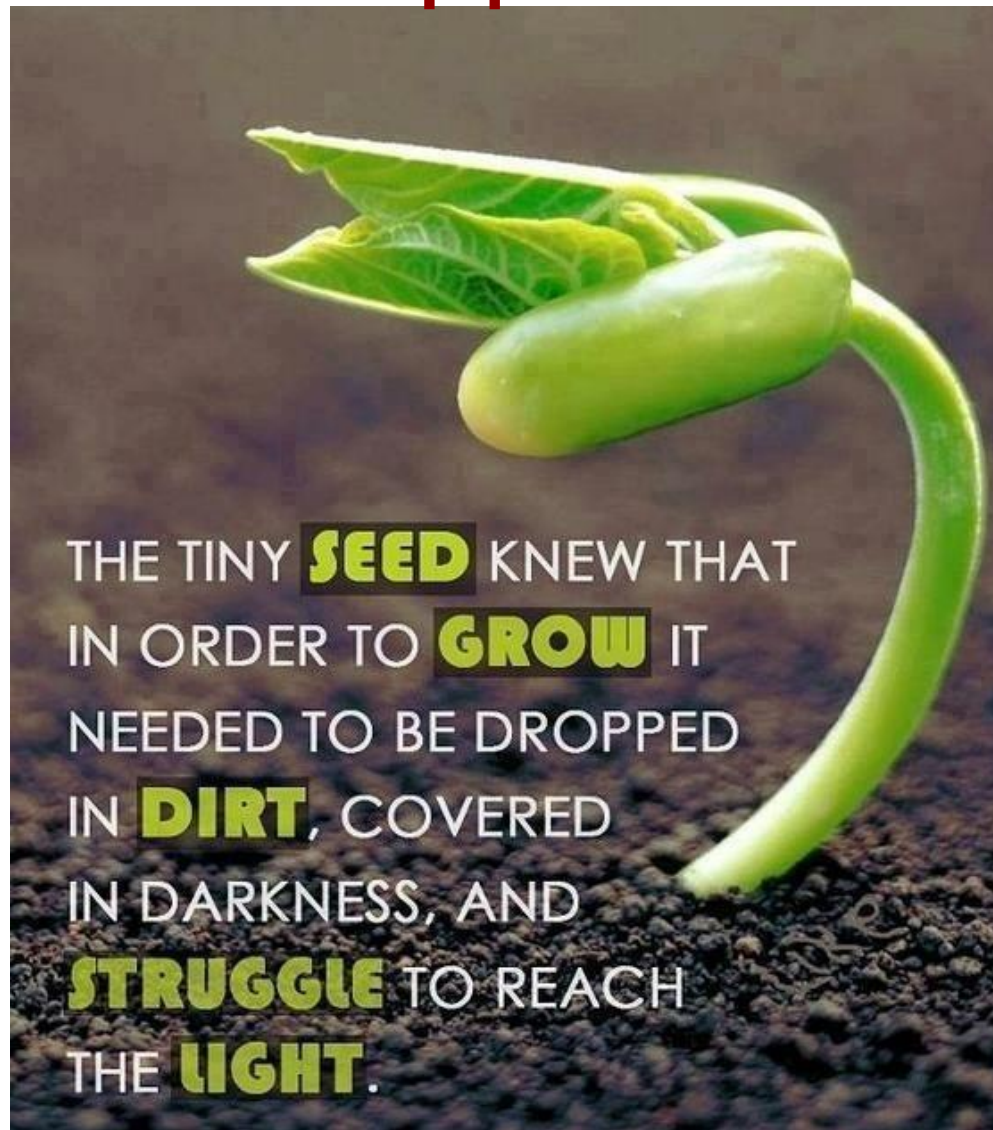
 - Never back date an I-9 to the date of hire!

- Know your rights. For example, no one is required to answer any questions. Make sure you consult with your attorney before giving agents access to employees or management, or before allowing any press contacts. Also, you have the right to continue operating your business during the ICE visit.

Does it feel like you're being
squeezed?



It won't happen overnight.



THE TINY **SEED** KNEW THAT
IN ORDER TO **GROW** IT
NEEDED TO BE DROPPED
IN **DIRT**, COVERED
IN DARKNESS, AND
STRUGGLE TO REACH
THE **LIGHT**.