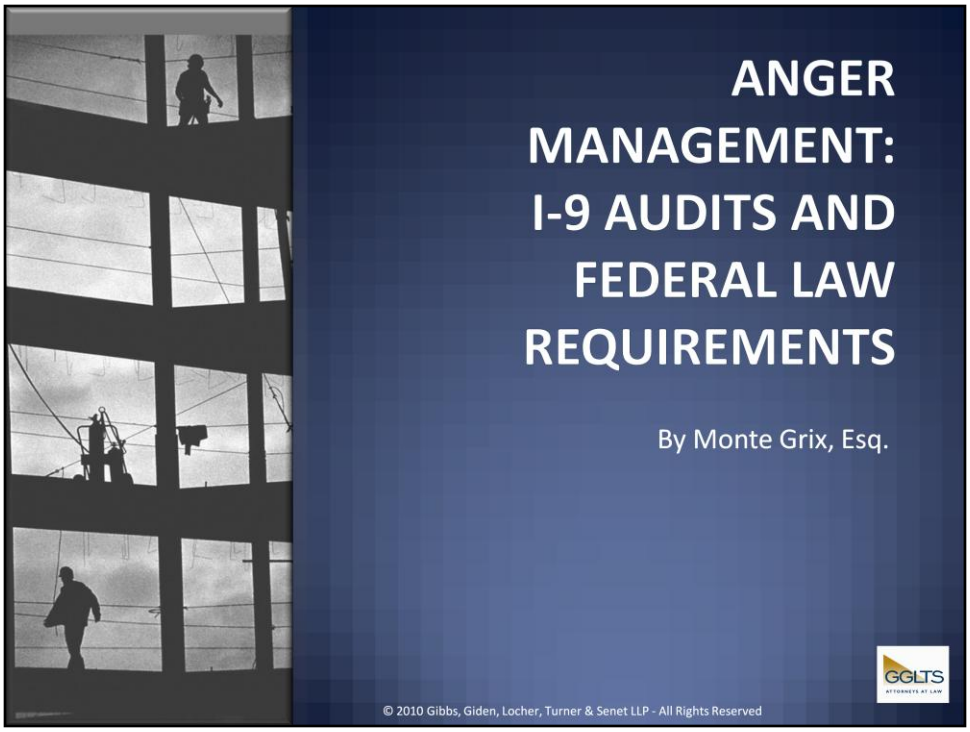

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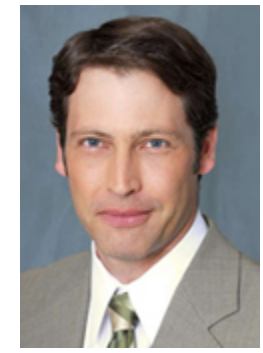
Attorneys



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Languages:

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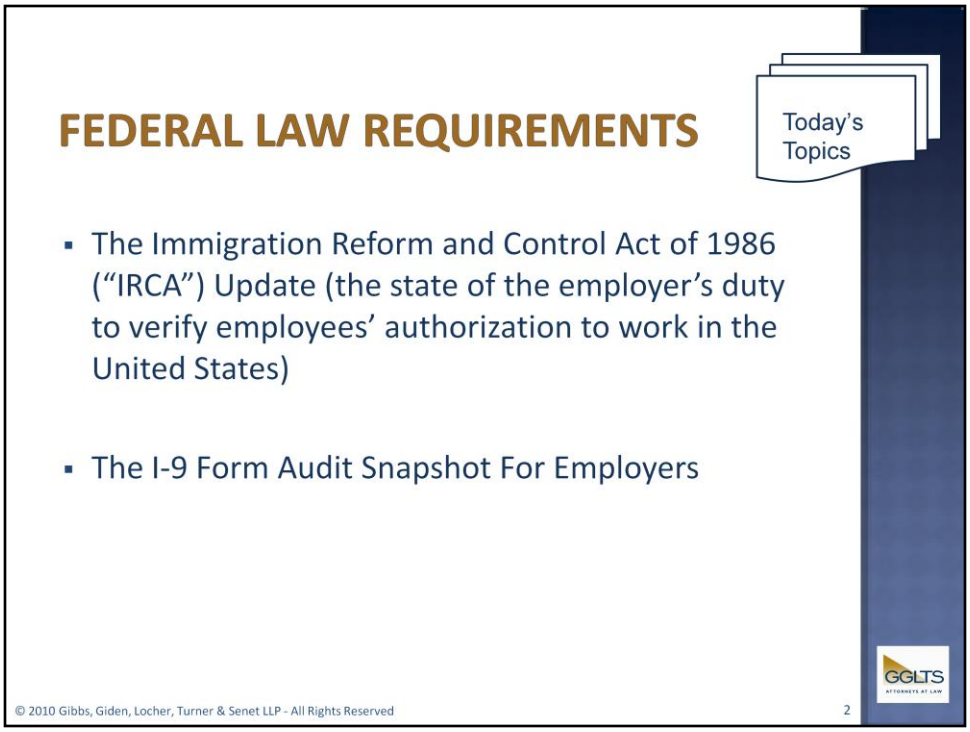
Published Articles:

12/16/08*: eInsight* Employmennt Law Update. CA Layoffs. By Gerald A. Griffin Esq. and Monte K.Grix, Esq.

Summer/Fall 2009 GGLTS Insight Newsletter, "Skipping Lunch?"An Interview Discussing Meal Breaks With Our Employment Law Attorneys: Gary E. Scalabrini, Esq., Monte K. Grix, Esq. and Gerald A. Griffin, Esq.



The 1986 IRCA is broadly construed (against employers)
Auditors only required to give the employer a three day notice. Are you ready?
Most companies are not ready and are upset when they find violations and are forced to pay unexpected fines and penalties.

General Rules regarding I-9 Compliance

1. Employers must examine specified documents of new employees to make sure the employees are authorized to work in the United States;

2. It requires employers to verify, under penalty of perjury, that all employees are United States citizens or authorized aliens by completing Form I-9 for each employee;

3. It requires employers to keep records showing eligibility to work in the United States for each employee;

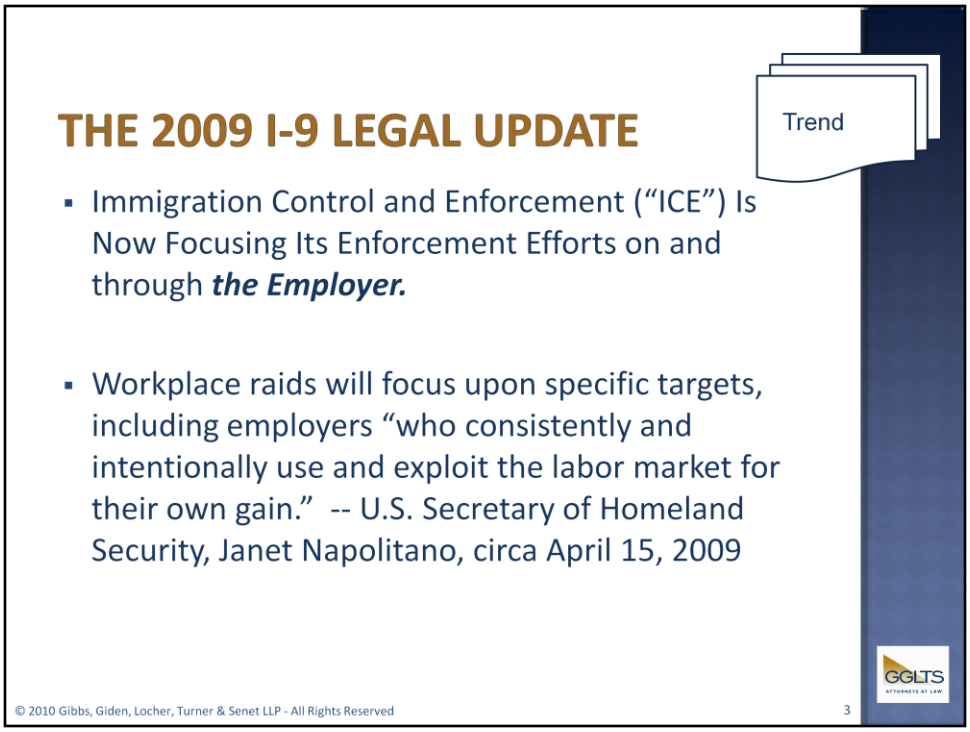
4. Makes it unlawful for an employer to continue to employ an alien knowing that he or she is, or has become, an unauthorized alien with respect to such employment;

5. It makes it unlawful for employers to knowingly hire, recruit or refer unauthorized aliens for employment in the United States; and

6. It imposes monetary and criminal sanctions for employers for violations and non-compliance with the Act.

I-9 Audit Snapshot:

• The 1986 I-9 Enforcement is Shifting its Focus
• Immigration Control and Enforcement ("ICE") Is Now Focusing Its Enforcement Efforts on and through ***the Employer***
• Records beyond I-9's can be sought and inspected (time cards, payroll records)
• Meetings with employees
• Three Days Notice required
• Force ICE to Get Subpoena?
• Audit violations can result in both Civil and Criminal Penalties



New York Times (Ginger Thompson), April 30, 2009:

Immigration and Customs Enforcement ("ICE") "will be instructed to take am at employers and supervisors for prosecution "through the use of carefully planned criminal investigations."

"The new guidelines…instruct them [ICE agents] to pursue evidence against the employer before going after the workers."

www.nytimes.com/2009/04/30/us/politics/30immig.html

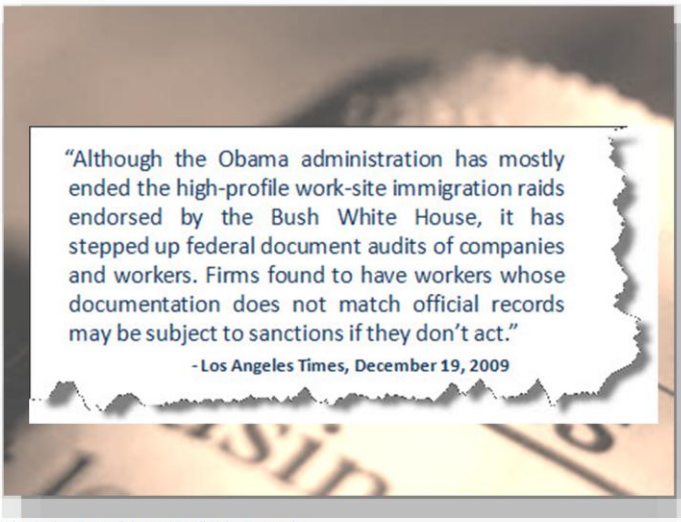
Fox News.com (Dan Springer), April 1, 2009:

"The February 24 [2009] raid of an auto parts plant in Bellingham, Wash., netted 28 illegal immigrants. While one was deported, the remaining workers were released from custody and given employment authorization documents, or EAD's, in exchange for cooperating with an ongoing investigation of their employer."

www.foxnews.com/story/0,2933,512098,00.html

OBAMA STEPS UP COMPANY I-9 AUDITS

Trend



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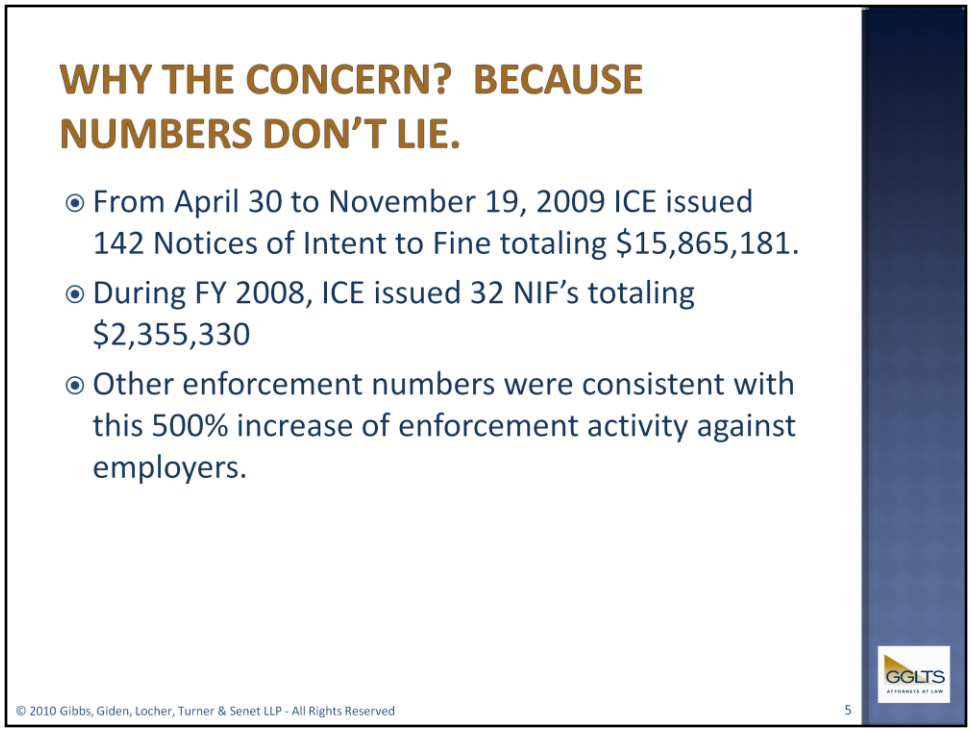


Statistics since implementation of new ICE worksite enforcement strategy on April 30:

45 businesses and 47 individuals debarred;

0 businesses and 1 individual were debarred during same period in FY 2008.

142 Notices of Intent to Fine (NIF) totaling $15,865,181;

ICE issued 32 NIFs totaling $2,355,330 in all of FY 2008.

45 Final Orders totaling $798,179;

ICE issued eight Final Orders totaling $196,523 during the same period in FY 2008.

1,897 cases initiated;

ICE initiated 605 cases during the same period in FY 2008.

1,069 Form I-9 Inspections;

ICE initiated 503 Form I-9 Inspections in all of FY 2008.

In July, ICE issued 654 NOIs to businesses nationwide in the largest operation of its kind before today - part of ICE's effort to audit businesses suspected of using illegal labor.

http://www.ice.gov/pi/nr/0911/091119washingtondc2.htm

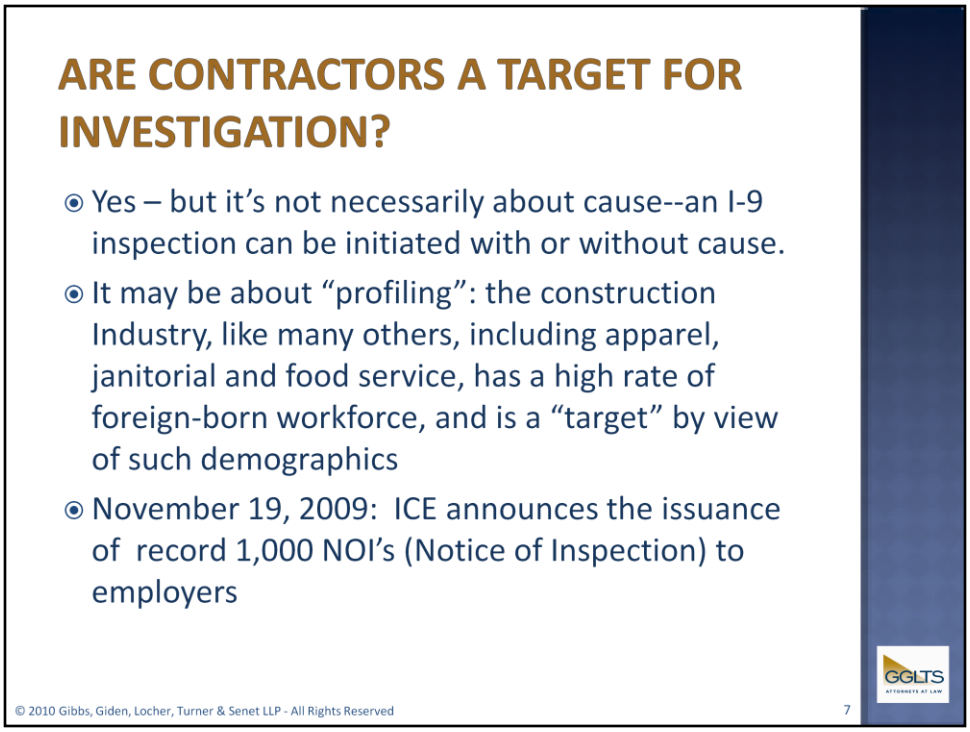
The best estimate of the number of unauthorized immigrants in the United States: 12 million as of 2006, with perhaps 500,000 new immigrants arriving annually.

Unauthorized immigrants constitute approximately 5% of the total United States workforce

Sample of undocumented workers by industry (as percentage of total workforce in that industry):

-- Food Service: 12%
-- Janitorial: 17%
-- Construction Industry: 14%

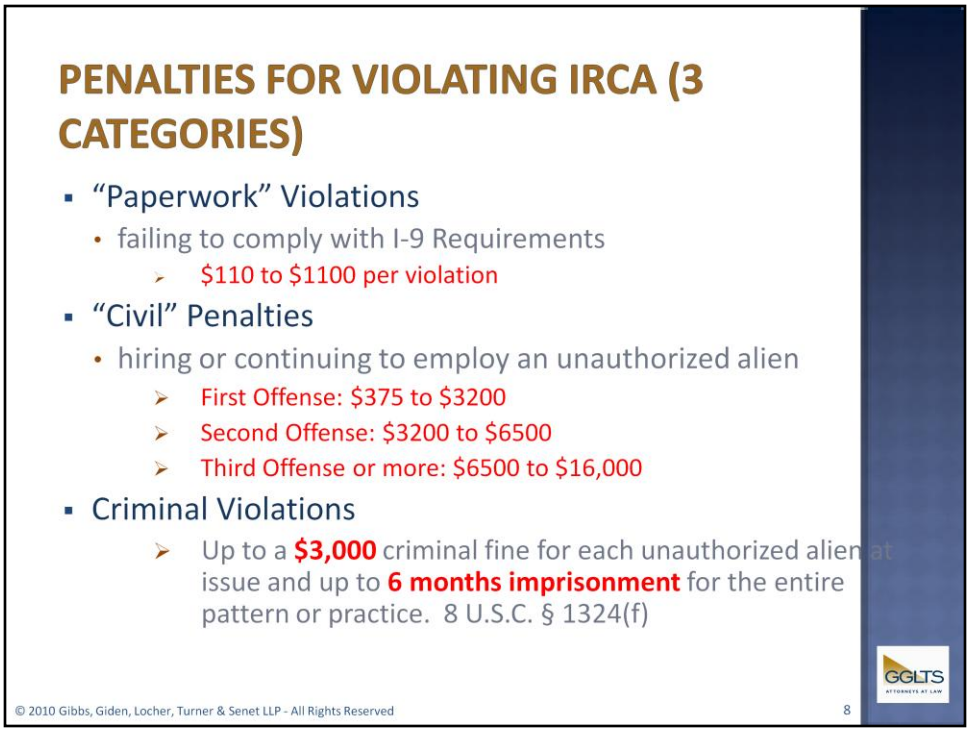
http://pewhispanic.org/files/factsheets/16.pdf



WASHINGTON-U.S. Immigration and Customs Enforcement (ICE) Assistant Secretary John Morton today announced the issuance of Notices of Inspection (NOIs) to 1,000 employers across the country associated with critical infrastructure-alerting business owners that ICE will audit their hiring records to determine compliance with employment eligibility verification laws.

"ICE is focused on finding and penalizing employers who believe they can unfairly get ahead by cultivating illegal workplaces," said Assistant Secretary Morton. "We are increasing criminal and civil enforcement of immigration-related employment laws and imposing smart, tough employer sanctions to even the playing field for employers who play by the rules."

The 1,000 businesses served with audit notices this week were selected for inspection as a result of investigative leads and intelligence and because of the business' connection to public safety and national security-for example, privately owned critical infrastructure and key resources. The names and locations of the businesses will not be released at this time due to the ongoing, law enforcement sensitive nature of these audits.



ICE will notify the audited party, in writing, of the results of the inspection once completed. The following are the most common notices:

Notice of Inspection Results – also known as a "compliance letter," used to notify a business that they were found to be in compliance.

Notice of Suspect Documents – advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has determined that the employee is unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing to employ this individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if they believe the finding is in error.

Notice of Discrepancies – advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine their work eligibility. The 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.

Notice of Technical or Procedural Failures – identifies technical violations identified during the audit and gives the employer 10 business days to correct the forms. After 10 business days, uncorrected technical and procedural failures will become substantive violations.

Warning Notice – issued in circumstances where substantive verification violations were identified but circumstances do not warrant a monetary penalty and there is the expectation of future compliance by the employer.

Notice of Intent to Fine (NIF) – may be issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations.

http://www.ice.gov/pi/news/factsheets/i9-inspection.htm

CIVIL PENALTY $ FACTORS

- Size of the business
- Good faith of the employer
- Seriousness of the violation
- Whether or not the employee at issue was, in fact, an unauthorized alien
- History of previous violations

Determination of Recommended Fine
The cumulative recommended fine set forth in the Notice of Intent to Fine is determined by adding the amount derived from the Knowing Hire / Continuing to Employ Fine Schedule (plus enhancement or mitigation) with the amount derived from the Substantive / Uncorrected Technical Violations Fine Schedule (plus enhancement or mitigation). Typically, the date of the violation shall be the date ICE conducted the Form I-9 inspection and not the date the Form I-9 was completed by the employer.

Penalties for Knowing Hire / Continuing to Employ Violations
Employers determined to have knowingly hire or continuing to employ violations shall be required to cease the unlawful activity and may be fined. The agent or auditor will divide the number of knowing hire and continuing to employ violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage. This percentage provides a base fine amount depending on whether this is a First Tier (1st time violator), Second Tier (2nd time violator), or Third Tier (3rd or subsequent time violator) case. The standard fine amount listed in the table relates to each knowing hire and continuing to employ violation. The range of the three tiers of penalty amounts (Since the passage of IRCA in 1986, federal civil monetary penalties have been increased on two occasions in 1999 and 2008 pursuant to the Federal Civil Penalties Inflation Act of 1990, as amended by the Debt Collection Improvement Act of 1996. These adjustments are designed to account for inflation in the calculation of civil monetary penalties and are determined by a non-discretionary, statutory formula. (See 73 FR 10130 (February 26, 2008)) are as follows:

Knowing Hire / Continuing to Employ Fine Schedule
(for violations occurring on or after 3/27/08) Knowing Hire and Continuing to Employ Violations First Tier $375 - $3,200 Second $3,200 - $6,500 Third Tier $4,300 - $16,000
Standard Fine Amount
0% - 9% $375 $3,200 $4,300
10% - 19% $845 $3,750 $6,250
20% - 29% $1315 $4,300 $8,200
30% - 39% $1785 $4,850 $10,150
40% - 49% $2255 $5,400 $12,100
50% or more $2,725 $5,950 $14,050

Knowing Hire / Continuing to Employ Fine Schedule
(for violations occurring between 9/29/99 and 3/27/08) Knowing Hire and Continuing to Employ Violations First Tier $275 - $2,200 Second $2,200 - $5,500 Third Tier $3,300 - $11,000
Standard Fine Amount
0% - 9% $275 $2,200 $3,300
10% - 19% $600 $2,750 $4,600
20% - 29% $925 $3,300 $5,900
30% - 39% $1250 $3,850 $7,200
40% - 49% $1575 $4,400 $8,500
50% or more $1,900 $4,950 $9,800

Penalties for Substantive and Uncorrected Technical Violations
The agent or auditor will divide the number of violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage. This percentage provides a base fine amount depending on whether this is a first offense, second offense, or a third or more offense. The standard fine amount listed in the table relates to each Form I-9 with violations. The range of penalty amounts are as follows:

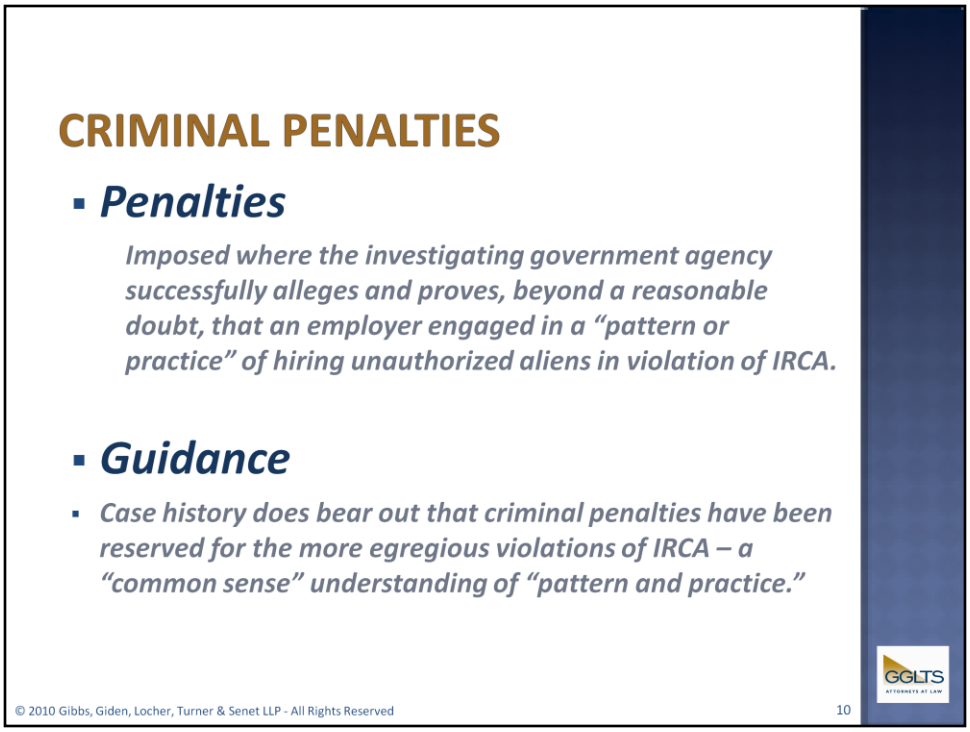
Substantive / Uncorrected Technical Violation Fine Schedule Substantive Verification Violations 1st Offense $110 - $1100 2nd Offense $110 - $1100 3rd Offense + $110 - $1100
Standard Fine Amount
0% - 9% $110 $550 $1,100
10% - 19% $275 $650 $1,100
20% - 29% $440 $750 $1,100
30% - 39% $605 $850 $1,100
40% - 49% $770 $950 $1,100
50% or more $935 $1,100 $1,100

Enhancement Matrix

The following matrix will be used to enhance or mitigate the recommended fine contained on the Notice of Intent to Fine. (Id.)

Enhancement Matrix Factor Aggravating Mitigating Neutral
Business size + 5% - 5% +/- 0%
Good faith + 5% - 5% +/- 0%
Seriousness + 5% - 5% +/- 0%
Unauthorized Aliens + 5% - 5% +/- 0%
History + 5% - 5% +/- 0%
Cumulative Adjustment + 25% - 25% +/- 0%

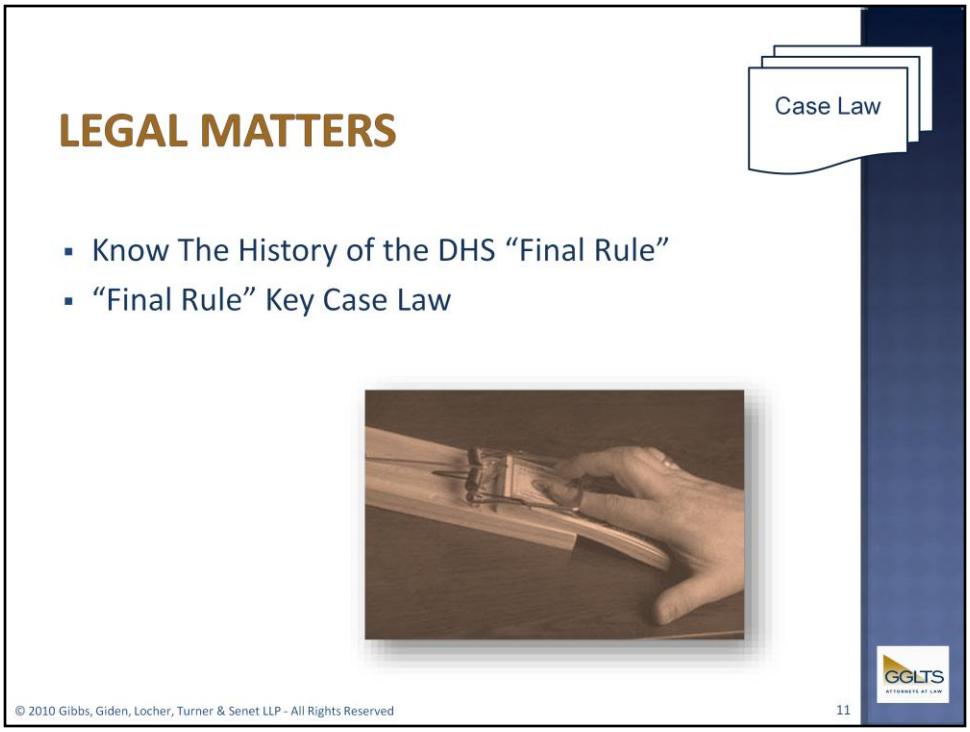
http://www.ice.gov/pi/news/factsheets/i9-inspection.htm



•**Guidance**: "pattern or practice" is to be given its "generic meaning" and applies to "regular, repeated and intentional activities," but does include "isolated, sporadic or accidental acts." *See* House Report No. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5663.

•Relevant legislative history also reveals that Congress restricted criminal penalties to egregious or "pattern and practice" violations, because, in its view, civil penalties would most often be sufficient to deter unlawful activity by employers. *Id*. at 5712.

•Case history does bear out that criminal penalties have been reserved for the more egregious violations of IRCA. In *Mester Manufacturing Co. v. Immigration and Naturalization Service*, for example, the INS (the predecessor to ICE) assessed criminal penalties only after the employer waited more than two weeks to take any action as to employees identified by INS as being unauthorized aliens. *See Mester Manufacturing Co. v. Immigration and Naturalization Service*, 879 F.2d 561 (1989).

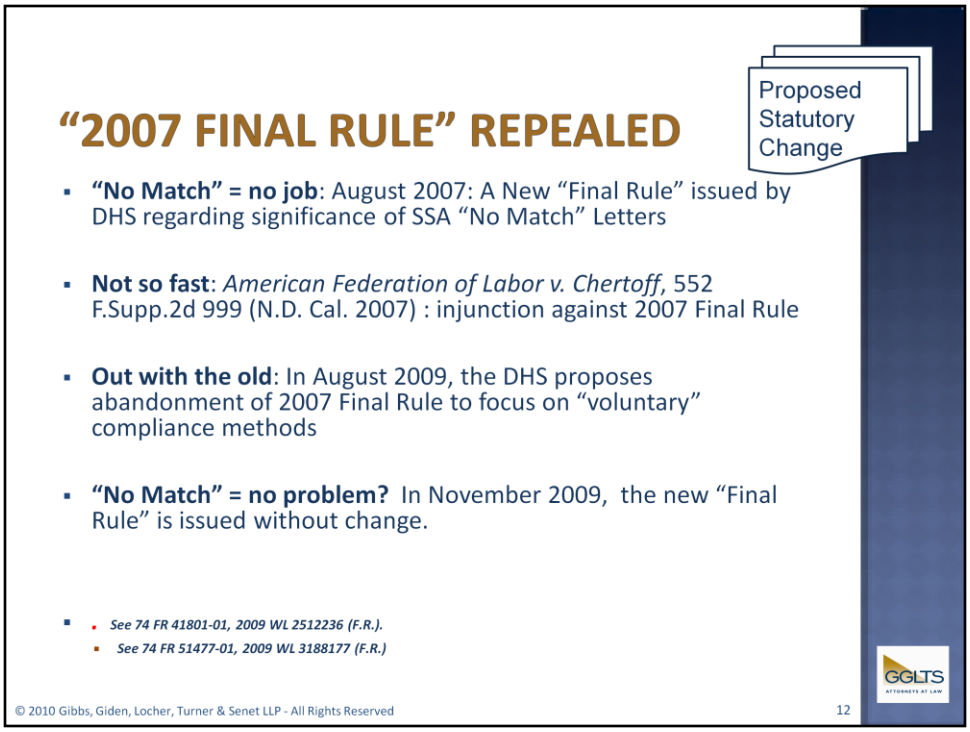


The DHS "Final Rule":

In 2007, the DHS issued its "Final Rule," stating that, in fact, if an employer received a No Match letter, that employer was deemed to have constructive knowledge that the employee at issue was not authorized to work in the United States. The employer was thus obligated, according to this rule, to immediately terminate such an employee.

***American Federation of Labor v. Chertoff*, 552 F.Supp.2d 999 (N.D. Cal. 2007)**

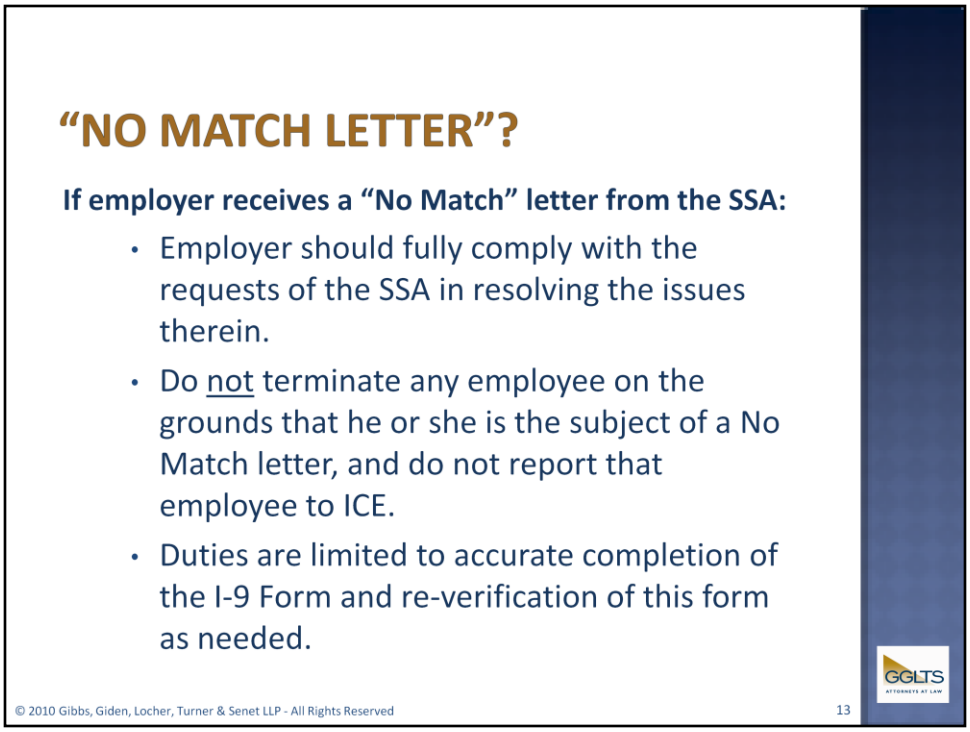
The AFL-CIO moved for a preliminary injunction, blocking implementation of the "Final Rule" on the grounds that such implementation would result in the termination of persons who were authorized to work in the United States, but whose numbers were mismatched as a result of human, clerical error. The Court agreed and granted the preliminary injunction. The Court then stayed the proceedings at the request of the DHS – the DHS's stated intent was to revise the "Final Rule" to avoid the consequences foreseen by the AFL-CIO.



"Department of Homeland Security (DHS) is amending its regulations by rescinding the amendments promulgated on August 15, 2007, and October 28, 2008, relating to procedures that employers may take to acquire a safe harbor from receipt of No-Match letters. DHS is amending its regulations as proposed on August 19, 2009, without change. Implementation of the 2007 final rule was preliminarily enjoined by the United States District Court for the Northern District of California on October 10, 2007. After further review, DHS has determined to focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs.

"DATES: This final rule is effective November 6, 2009."

See 74 FR 51477-01, 2009 WL 3188177 (F.R.)



•Upon hire, employees must complete an Internal Revenue Service "W-4." Employees must submit their Social Security numbers and elect the amount of federal tax withholding desired.

•If the SSA cannot match employee contributions to a SSN, i.e., if the taxpayer's name and Social Security number don't "match," the SSA sends out a "No Match" letter to both the employer and employee, requesting correction

•In 2007, the DHS issued its "Final Rule," --if an employer received a No Match letter, that employer was deemed to have constructive knowledge that the employee not authorized to work in the United States, and employer was obligated, to immediately terminate the employee.

•AFL-CIO sued the DHS Secretary over the implementation of this rule. The AFL-CIO moved for a preliminary injunction, blocking implementation of this "Final Rule" on the grounds that it would result in the termination of persons who were authorized to work in the United States, but whose numbers were mismatched as a result of human error. The Court agreed and granted the preliminary injunction. The Court then stayed the proceedings at the request of the DHS – the DHS's stated intent was to revise the "Final Rule" to avoid the consequences foreseen by the AFL-CIO.

•*See American Federation of Labor v. Chertoff* et al., 552 F.Supp.2d 999 (N.D. Cal. 2007).

LOCAL I-9 AUDIT TRENDS

Trend

Los Angeles Times | ARTICLE COLLECTIONS

L.A. employers face immigration audits

Federal agency targets hiring practices in a nationwide inquiry.

July 02, 2009 | Anna Gorman

Federal officials Wednesday notified more than 650 businesses around the country, including nearly 50 in Los Angeles, that their records will be audited as part of a widening effort to find companies that hire illegal immigrants.

The number of notices issued is the largest ever in a single day and exceeds the total sent out in all of fiscal 2008, Immigration and Customs Enforcement officials said.

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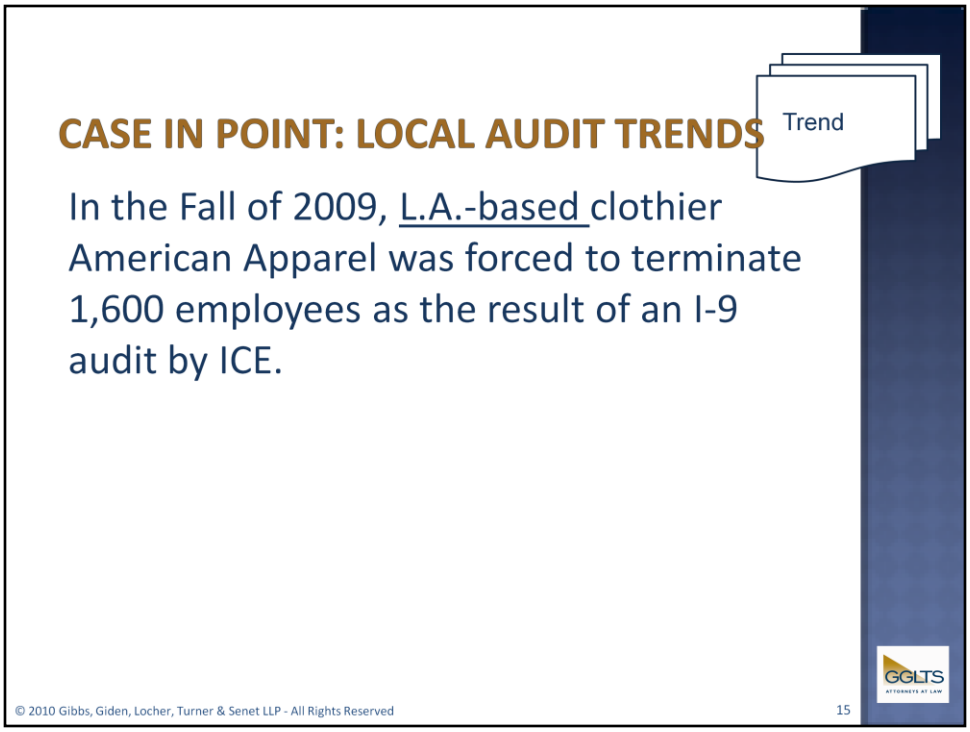
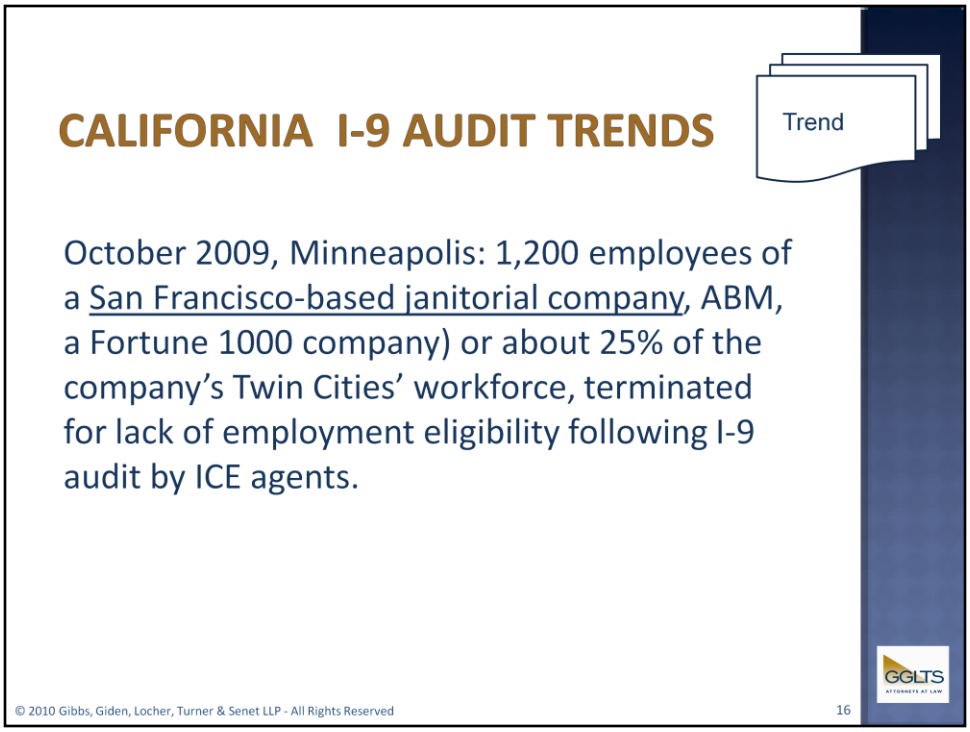


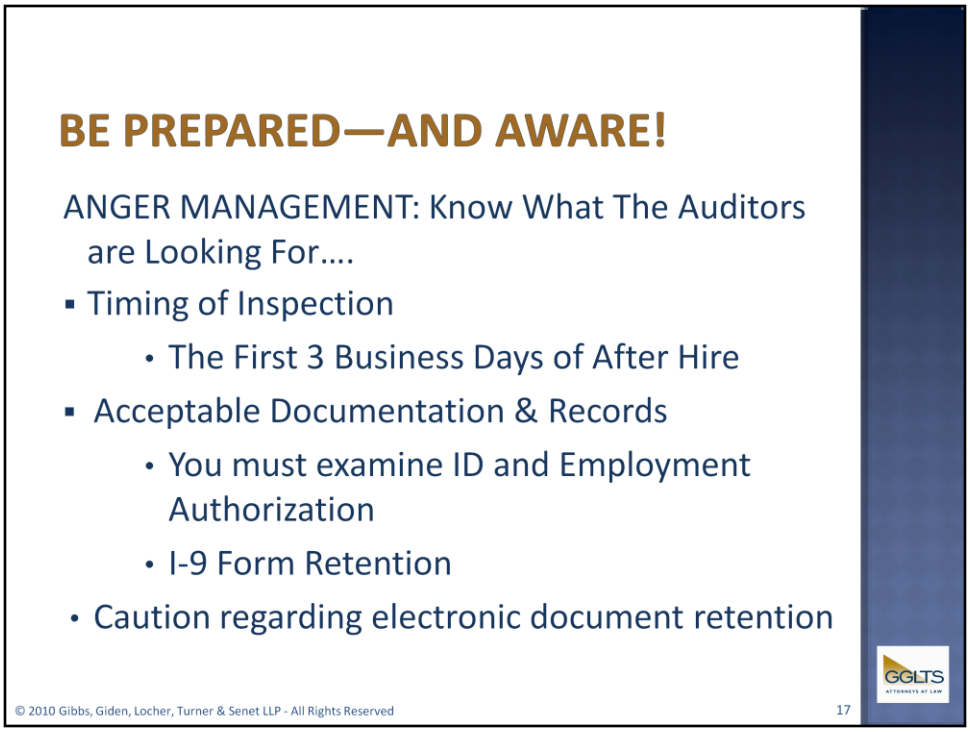
"Hundreds of American Apparel Inc. workers must leave the company because they were unable to prove their immigration status or fix problems with their employment records, the company said Wednesday.

"The terminations come two months after the Los Angeles manufacturer and retailer announced that a government inspection had found that about 1,600 of its workers didn't appear to be authorized to work in the U.S."

--Los Angeles Times, September 3, 2009
http://articles.latimes.com/2009/sep/03/business/fi-american-apparel3



Reference Article link:
http://minnesota.publicradio.org/display/web/2009/11/09/immigrants-fired/



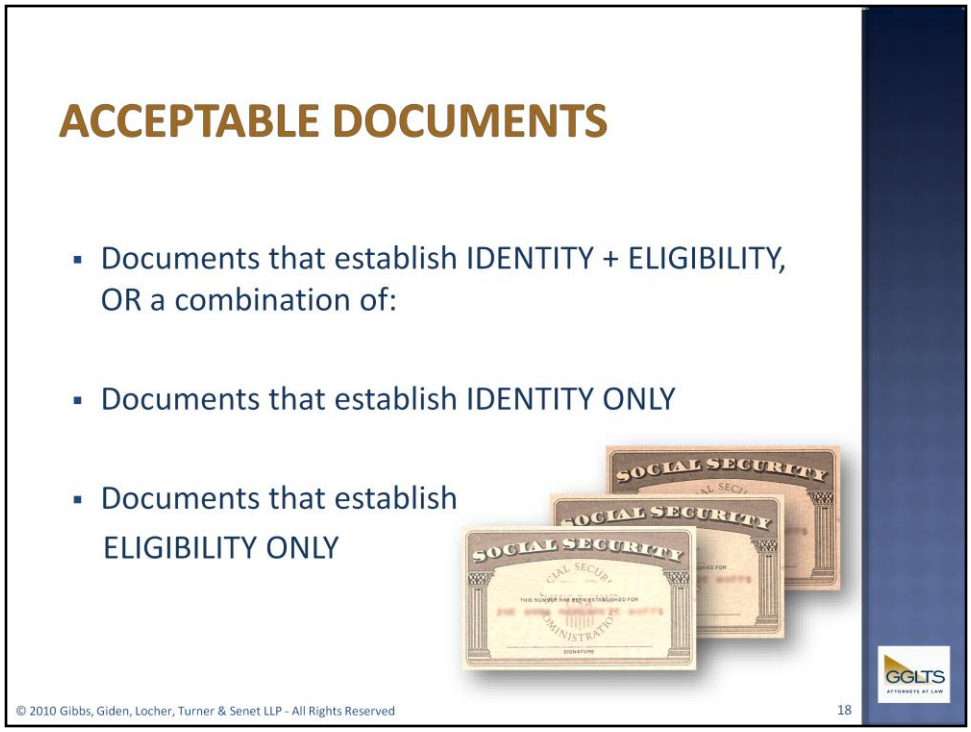
Within **three (3) business days of the hire of an employee**, an employer must physically examine documentation presented by the employee to establish his or her identity and employment authorization. The employer must also complete the attestation and other appropriate sections of Form I-9 within three (3) business days of hire. The employee must complete his or her part on the first day of employment. However, an offer of employment does not constitute a "hire," rather, the IRCA defines "hire" as the actual commencement of employment of an employee for wages or other remuneration.

•An employer that hires an individual for fewer than three (3) days must complete the document examination and Form I-9 before the end of the employee's first working day.

•An employer that hires an individual whom it had previously employed, and concerning whom it had previously completed a Form I-9 indicating compliance with the verification requirements, must inspect the previously completed form. If on inspection, the employer determines that the individual is no longer authorized to work in the United States, he may not hire the individual unless all of the employment verification requirements of the IRCA are newly met.

•An employee's refusal to present proof of identity and employment authorization is grounds for refusing to hire the individual: an employer could be found in violation of the *IRCA* if such documents are not examined.

•At a minimum, the employer must retain its I-9 Forms.

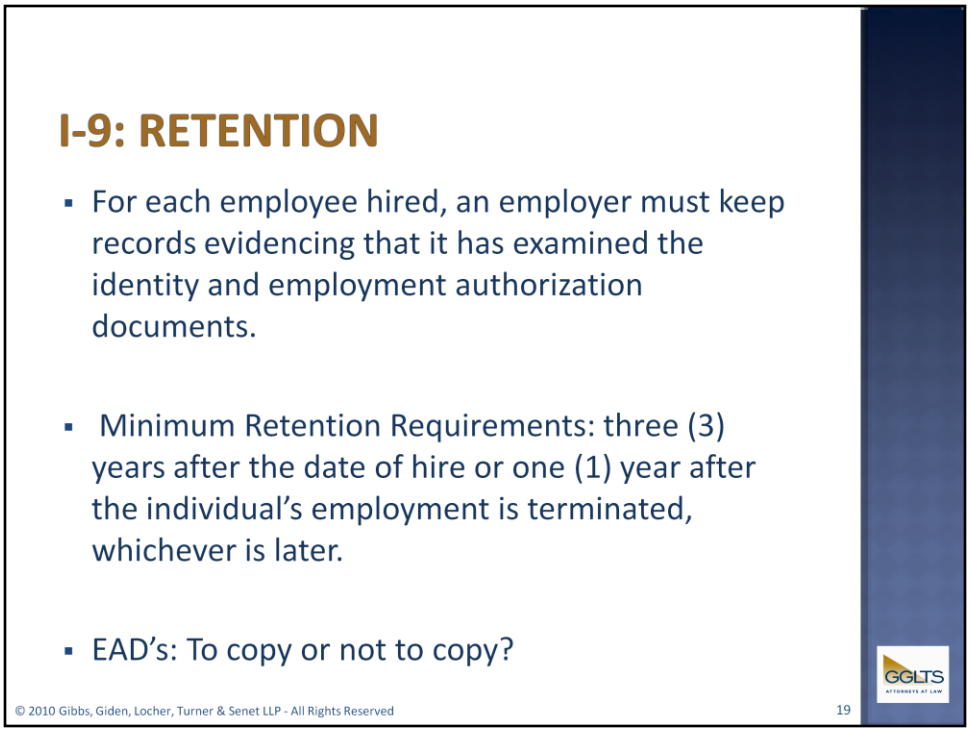


•The following documents have been designated as being acceptable to establish *identity* only (Category No. 2):

- •A state-issued driver's license or state-issued identification card containing a photograph;
- •A school identification card with a photograph;
- •A voter registration card;
- •A United States military card or draft record;
- •Identification card issued by federal, state or local government agencies;
- •A military dependent's identification card; and
- •A Native American tribal document; and
- •A Driver's License issued by a Canadian government authority.
- •Persons who are under 18 years of age may also present any of the following "List B" documents
- •School record or report card
- •Clinic, doctor or hospital record
- •Day-care or nursery school record

•The following documents have been designated as acceptable *to establish employment authorization only* (Category No. 3):

- •A Social Security card other than one that states on its face that it is not valid for employment purposes;
- •An unexpired employment authorization document issued by the Department of Homeland Security
- •A Native American tribal document;
- •A United States Citizen Identification Card (Form I-197);
- •An identification card for use of resident citizens in the United States (Form I-179);
- •An original or certified copy of a birth certificate issued by a state, county, municipal authority, or outlying possession of the United States bearing an official seal;
- •A certification of report of birth (Form DS-1350, issued by the Department of State); or a Certification of Birth Abroad (Form FS-545), issued by a foreign service post.



The Form I-9 must be retained by the employer for three (3) years after the date of hire or one (1) year after the individual's employment is terminated, whichever is later. In effect, with respect to any employee who is employed for two (2) years or more, Form I-9 must be retained until one (1) year after the employee has been terminated. Employers may retain Forms I-9 in electronic format, in addition to paper, microfilm or microfiche.

• *U.S. v. Wal-Mart, Inc.*, 1CV-05-0525 (M.D. Penn. 2005)

• Resolved by settlement: ICE asserted that Walmart, which contracted with janitorial service, was responsible for that contractor's failure to verify the employment eligibility of 245 (of its) employees

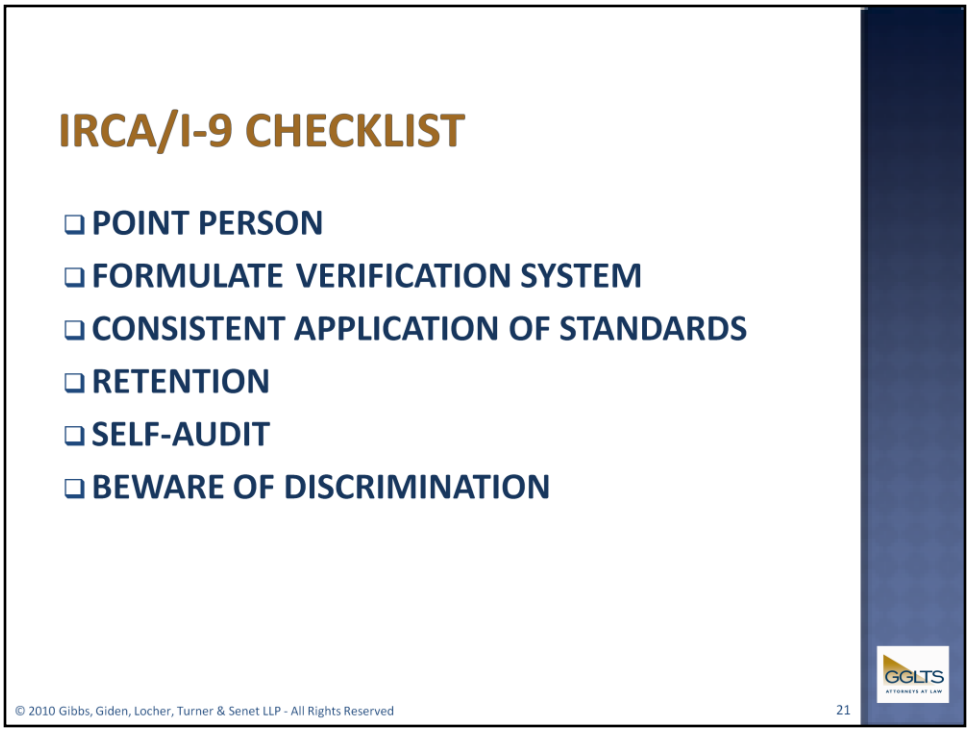
• Since not litigated to judgment, basis for ICE's assertion unclear – sheer number of employees, failure to abide by labor laws by I.C?

• ***Employers should not be liable for IRCA violations committed by parties with whom they contract if there a true independent contractor relationship between the employer and its contractors.***

• **Contracts With Independent Contractors**
(a) provision: "it is the contractor's responsibility properly to complete I-9's for all employees assigned to the employer's place of business"
(b) a representation by the contractor that it understands and complies with IRCA
(c) a representation by the contractor that it is not knowingly employing any workers assigned to the employer who are not authorized to work in the U.S.;
(d) an indemnity provision
(e) provision: "contractor is in and will maintain compliance with all applicable labor laws, including wage and hour laws"

• **Require That Contractors Provide You With Copies Of I-9's or Permit Audit**
(Consent Form/Privacy Rights Concerns)

• **Require That The Contractors Provide You With A Copy Of Their Written I-9 Compliance Policies And Procedures**
• **Do Not Inadvertently Become The Employer Of The Contractor's Workers!**
(a) contractual provision: "the relationship is an independent contractor relationship"
(b) Do not to provide tools and equipment for contractor use
(c) Do not direct the means and methods used by contractors
(d) Do not set the contractor's hours of work
(e) Do not use the services of contractors in a way that prevents the contractors from doing work for other clients, etc.



•**POINT PERSON**: Designate someone who has authority to hire new employees and make sure that that person has a complete understanding and knowledge of *IRCA's* requirements.

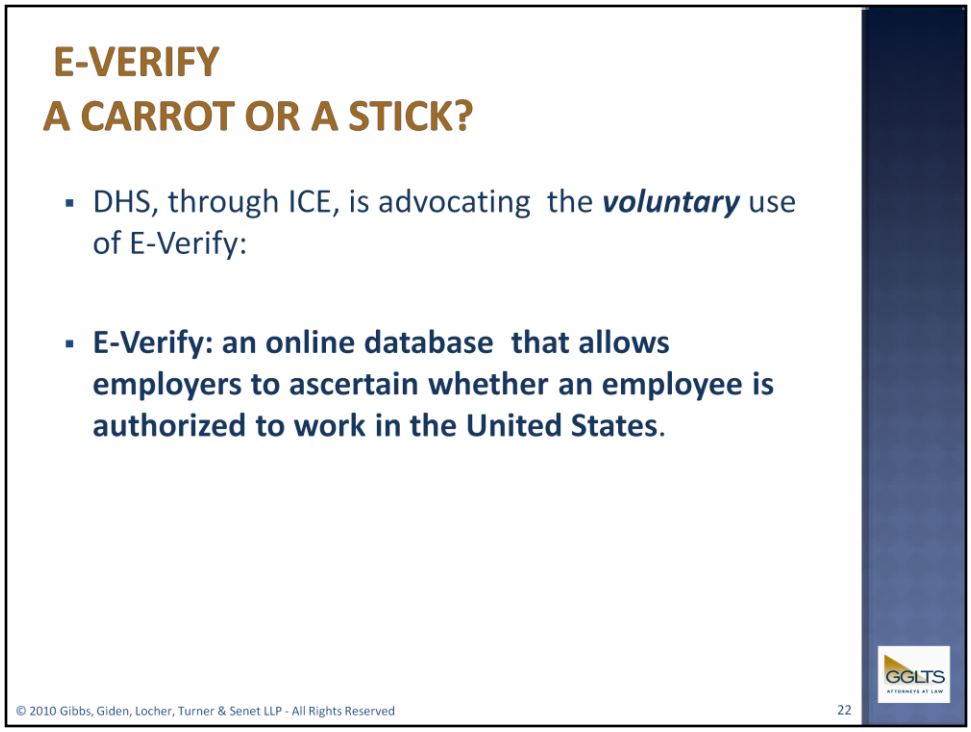
•**FORMULATE** a system of document examination and verification consistent with *IRCA*. Limit the number of persons authorized to examine these documents and give them the checklist of acceptable identity and employment authorization documents I have given you in this letter.

•**CONSISTENT APPLICATION OF STANDARDS**: Implement standard procedures for completing Form I-9. In using standard procedures, you will avoid unintentional violations of IRCA, including its antidiscrimination provisions.

•**RETENTION**: Establish a system for retaining verification documents and completed Forms I-9. The system should be separate from your normal personnel records system. The purpose of segregating these records is to limit unauthorized access to Form I-9 and verification documents.

•**SELF AUDIT**: Establish a "self-audit" review procedure. Forms I-9 should be reviewed periodically to make sure that they are complete and that the information listed is accurate. Expiration dates of documents presented to establish employment eligibility should be monitored by a "reminder" system.

•**BEWARE OF DISCRIMINATION**: Be aware of IRCA's antidiscrimination provisions. A United States citizen may be hired over a resident alien when both are equally qualified, but it is an unlawful employment practice to discriminate or refuse to hire individuals because of their national origin or alien status.



•DHS, through ICE, is advocating the ***voluntary*** use of E-Verify:

•**E-Verify: an online database that allows employers to ascertain whether an employee is authorized to work in the United States**. It helps the employer determine whether the employment documents being presented for I-9 purposes are, in fact, valid. If an employer or an employer's representative completes the I-9 Form without the use of E-Verify, that person is attesting under penalty of perjury that the documents presented "appear to be genuine."

•**More Certainty**: In the past, employers and their counsel have argued that such a requirement essentially conscripts the employer as an agent of the DHS, but provides no training or indemnification to the employer. E-Verify largely addresses these concerns: first, it puts at least some of the responsibility for determining work authorization upon the federal government. Second, in the event of an audit or an administrative complaint filed by ICE, the Department of Labor, or the Office of Special Counsel for Immigration-Related Unfair Practices, use of E-Verify creates a rebuttable presumption that the employer has not knowingly hired an unauthorized alien.

• Initiated in 2007.

• Stated Goal: "To assist employers in targeted sectors to develop a more secure and stable workforce and to enhance fraudulent document awareness through education and training."

• employer is required to enroll in E-Verify; enroll in the Social Security Number Verification Service

• adhere to IMAGE Best Employment Practices

• undergo an I-9 audit conducted by ICE

• "review and sign an official IMAGE partnership agreement with ICE."

*** "Best Employment Practices" include establishing an "internal training program, with annual updates, on how to manage completion of Form I-9 (Employee Eligibility Verification Form)"; permitting the I-9 and E-Verify process "to be conducted only by individuals who have received this training – and include a secondary review as part of each employee's verification to minimize the potential for a single individual to subvert the process"; arranging for "annual I-9 audits by an external auditing firm or a trained employee not otherwise involved in the I-9 and electronic verification process"; establishing a "self-reporting procedure for reporting to ICE any violations or discovered deficiencies"; "establishing a protocol for responding to no-match letters received from the Social Security Administration"; establishing a tip line for employees to report activity relating to the employment of unauthorized aliens and a protocol for responding to employee tips; establishing "a protocol for assessing the adherence to the 'best practices' guidelines by the company's contractors/subcontractors"; and submitting "an annual report to ICE to track results and assess the effect of participation in the IMAGE program."

I-9 AUDIT TAKE AWAY TIPS

What to Remember

- ✓ Limit Those Employees Authorized to Administer I-9's
- ✓ Establish Clear Protocol for I-9 Procedure at Time of Hiring
- ✓ Establish Protocol for I-9 Retention and Turnover
- ✓ Pre-emptive Strike: Consider an Internal Audit with your lawyer or at least a third party administrator
- ✓ Beware of discrimination claims! Apply I-9 policies UNIFORMLY. If you discover an apparently unauthorized worker, consult your lawyer prior to termination
- ✓ Properly structure and monitor independent contractor relationships

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AND NOW FOR SOMETHING REALLY DIFFERENT…

- Other Employment Law Update Key Issues
  - Proposed Healthcare Legislation

STATE OF THE UNION: THE HEALTH CARE BILLS AND WHAT THEY MEAN FOR EMPLOYERS

- The Cadillac Tax: 40% excise tax on individual plans above $8500; family plans above $23,000
- Prohibition of discrimination based on salary
- Duty to enroll employee in employer health plan for new employees, w/ opportunity for opt-out
- Duty to inform employee of "Exchanges"
- "Premium Assistance Tax Credit" ("PATC")

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PATC: IN'S AND OUT'S

Proposed Legislation

- More than 50 employees, but no offered coverage? PATC by at least one employee? Then must pay $750 per employee

- More than 50 employees, coverage offered, but at least one employee receiving PATC? Then pay lesser of $750 per each full time employee or $3,000 per each employee receiving PATC

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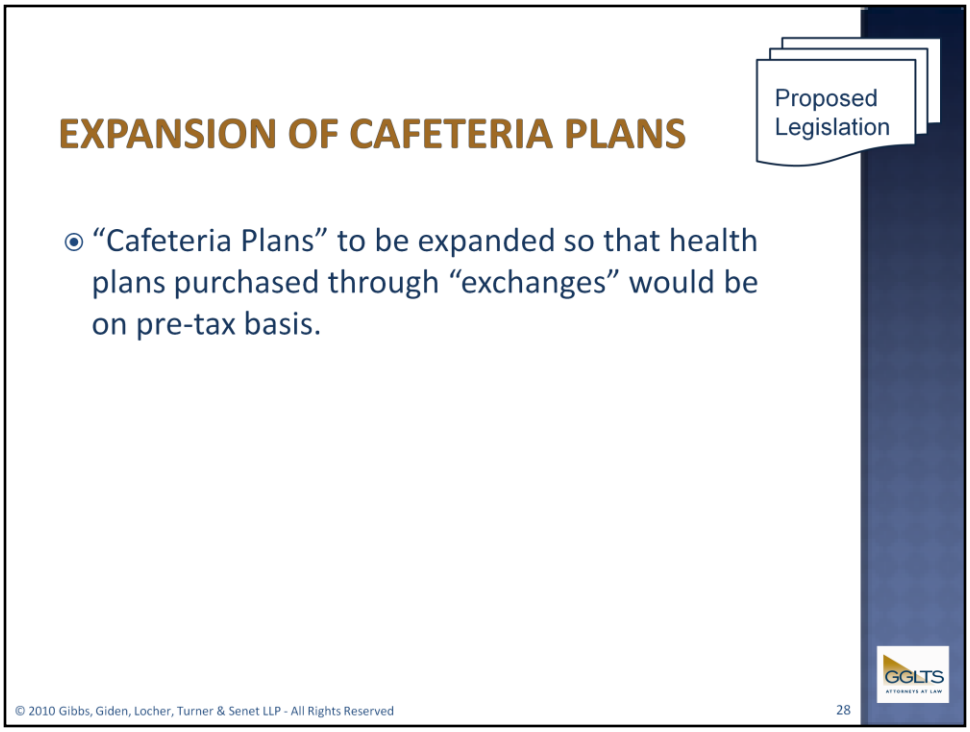

http://dpc.senate.gov/dpcdoc-sen_health_care_bill.cfm

http://democrats.senate.gov/reform/patient-protection-affordable-care-act-as-passed.pdf