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Trump's Executive Orders Considered: Implications for Private Employers – Part Two

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President Trump issued an unprecedented number of executive orders in his first week in office. In our previous update on January 27, we discussed the orders directing the elimination of diversity, equity and inclusion ("DEI") programs in the federal agencies and government contracting, and adopting a policy of recognizing two unalterable sexes (rather than self-designated gender identity) in the enforcement of federal laws regarding sex-based rights, protections, opportunities and accommodations. In addition, President Trump has signed multiple immigration-related orders focusing on border security, restrictions on birthright citizenship, enhancement of vetting and screening of immigrants seeking entry into (and already residing in) the United States, and the prioritization of both civil and criminal enforcement of violations of the Immigration and Naturalization Act ("INA") and other federal laws.

This update discusses the anticipated impact of the immigration-related orders on private employers and, in particular, a renewed and more aggressive focus on Form I-9 audits by the U.S. Immigration and Customs Enforcement ("ICE") division of the U.S. Department of Homeland Security ("DHS").

The Impact of Certain Immigration-Related Orders on the Private Sector

Two immigration-related orders signed by President Trump are particularly relevant to private sector employers:

1. "Protecting the American People Against Invasion" directs the "efficient and expedited removal" of individuals not legally authorized to reside or work in the U.S. and prioritizes both civil and criminal enforcement, including by taking agency action to ensure that "employment authorization is provided in a manner consistent with [the INA], and that employment

authorization is not provided" to anyone not legally authorized to be in the U.S.; and

2. "Securing Our Borders" contains broad directives for the removal and prosecution of individuals "who violate the immigration laws" (and the prosecution of "those who facilitate their unlawful presence" in the U.S.), as well as the detention of unauthorized individuals who are apprehended as a result of agency enforcement actions.

Given the explicit directives in these orders and the administration's enforcement-focused rhetoric, employers should expect and prepare for an uptick in both Form I-9 audits and unannounced worksite enforcement actions by ICE.

Form I-9 Process and Obligations

Form I-9 places compliance obligations on both the employee and the employer. The employee must attest, under penalty of perjury, to their identity and provide prescribed documentation evidencing their authorization to work in the U.S. The employer must (A) ensure that the form is correctly completed, (B) physically examine the identity and work authorization documentation presented by the employee to determine whether it reasonably appears to be genuine, and (C) comply with prescribed document retention requirements.[1] The employer is also required to attest, under penalty of perjury, that, upon examination, the verification documents presented with the Form I-9 appeared both genuine and to relate to the named employee and, to the best of the employer's knowledge, the employee is thereby authorized to work in the U.S. Forms I-9 must be completed (including with respect to the examination of the identity and work authorization documentation) within three business days of the employee's date of hire.

Agency-Initiated Audits

ICE inspections[2] of an employer's Forms I-9 may be lead-driven (*i.e.*, based on actual information or tips that an employer has hired unauthorized workers) or randomly initiated. ICE launches a Form I-9 audit by serving the employer with a notice of inspection ("NOI"). The NOI requires the employer to provide ICE with copies of the Forms I-9 and supporting documents within three business days of receipt of the NOI. ICE also may request additional records like lists of current and former employees (including dates of hire and termination), payroll and tax information, organizational documents of the employer (i.e., Articles of Incorporation, business licenses, taxpayer identification number, etc.), E-Verify or SSN Verification Service data (if applicable), copies of social security number "no-match" letters and relevant immigration-related communications with the U.S. Citizenship and Immigration Services and/or Department of Labor, and information about any prior Form I-9 audits.

If your business is served with a NOI, begin by contacting your immigration counsel for support. Carefully review the NOI to determine the scope of the audit, and respond only with those documents actually requested in the NOI. You should keep a copy of the entire response "package" provided to ICE.

ICE will review the information provided and inform you of the outcome of its audit via one of the following:

- *Notice of Inspection Results* ("compliance letter"), if you are found to be in compliance with the law.
- *Notice of Suspect Documents*, if ICE determines that an employee is not authorized to work. This notice will generally advise you of the potential civil and criminal penalties for continuing

to employ that individual, and of your ability to begin remedial actions in “good faith” within 10 days of receiving the notice. You also may dispute such a determination prior to terminating the affected employee.

- *Notice of Discrepancies*, if ICE is unable to determine work eligibility for an employee. This may trigger a follow-up visit from ICE and require you to request new and different employment verification documents and terminate the employee if such documents cannot be produced.
- *Notice of Technical or Procedural Failures*, if ICE identifies technical or procedural errors in its review of the submitted Forms I-9. This notice generally advises of a 10-day period within which to correct the identified error, unless you have engaged in a pattern or practice of hiring unauthorized workers.
- *Warning Notice*, if ICE identifies one or more substantive errors in the submitted Forms I-9 and there is an expectation that you will comply with all Forms I-9 compliance requirements in the future.
- *Notice of Intent to Fine,* if ICE uncovers substantive failures, uncorrected procedural or technical failures, or ICE determines that you knowingly hired or continue to employ unauthorized individuals. Once served with a Notice of Intent to Fine, you may have the opportunity to negotiate a settlement with ICE or request a hearing before an administrative law judge (“ALJ”).
- *Final Order*, if a written request for an ALJ hearing is not timely received. This Final Order is not appealable.

Penalties for Form I-9 violations may include significant monetary fines, criminal penalties, cease and desist orders to stop continued employment of unauthorized individuals, and contract debarment.

Employer Self-Audits

We encourage all employers to conduct a Form I-9 self-audit (i) to ensure ongoing compliance with applicable law, (ii) to identify any substantive and/or technical or procedural errors that may be corrected, and, (iii) to avoid or mitigate costly monetary penalties for noncompliance. Employers should look for common issues like incomplete or late Forms I-9, and missing or misplaced verification documents. Self-audits should cover Forms I-9 and verification documents for all active employees and terminated employees within the mandatory Form I-9 retention period and may not be conducted in a manner that is discriminatory or retaliatory. Specifically, an employer may not conduct an internal audit selectively based on an employee’s citizenship status or national origin, or in retaliation against any employee(s). The self-audit also should include a review of the employer’s Form I-9 collection, timing, and retention processes.

Conclusion

As we noted in our January 27 update, the breadth and tone of the executive orders issued by President Trump during his first week in office made clear that this administration’s enforcement priorities will be far more aggressive than those of the prior administration. While the laws requiring employment eligibility verification have been in effect for decades, the approach to enforcing those laws has shifted. Employers must be aware of and take steps to prepare for more frequent audits, inspections and worksite enforcement actions under the current administration.

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[1]The INA requires an employer to retain Forms I-9 and collected identity and work authorization documentation for (i) three years after the date of hire or (ii) one year after the date of the individual’s termination from employment, whichever is later.

[2]Note that the U.S. Department of Justice's Immigrant and Employee Rights Section and the U.S Department of Labor also have authority to initiate Form I-9 inspections, which may be triggered not only by complaints or suspicions of the employment of unauthorized workers, but also as a result of civil rights and discrimination complaints (for example, based on claims of discriminatory or retaliatory Form I-9 collection or self-audit processes).

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