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Enforcement

The Obama administration has been aggressive in targeting employers for violations of the I-9 employment eligibility verification process, but the Department of Justice's Office of the Chief Administrative Hearing Officer has been cutting back on the size of the penalties imposed, attorney Avram E. Morell of Pryor Cashman LLP writes in this BNA Insights article.

Morell examines recent OCAHO decisions that largely have scaled back the amounts employers must pay for I-9 violations, accounting both for employer size and good faith attempts at compliance.

Administrative Judges Push Back on Employer Sanctions for I-9 Violations

BY AVRAM E. MORELL

Over the past few years, we have watched the Obama administration step up enforcement of laws requiring employers to use Form I-9 to verify that employees are authorized to work in the U.S.

The administration's policies have resulted in more audits of businesses and nonprofit organizations and more sanctions for employers who are found not to be in compliance. This increased enforcement has been met with near unanimous support in Congress, which will almost certainly make stronger ''employment verification'' rules a key component of any immigration overhaul legislation.

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And yet, a number of recent decisions from the Department of Justice's Office of the Chief Administrative Hearing Officer, the administrative body charged with reviewing the government's employer sanctions determinations, reflect a surprisingly liberal trend.

Again and again, these decisions direct the Department of Homeland Security to reduce fines to levels more proportionate to the size of the business and emphasize that the sanctions scheme must allow real world employers to pay for ''good faith'' mistakes without suffering extreme consequences. This article will examine some of these decisions and seek to draw relevant guidance for employers.

Form I-9 Started in 1986. Our story begins in 1986. With the passage of the Immigration Reform and Control Act, U.S. employers became responsible for verifying that every new employee has proper authorization to work in the U.S.

IRCA and its implementing regulations subject employers to both civil and criminal sanctions not only for knowingly hiring an unauthorized worker, but even for failing to properly complete the employment eligibility verification form, also known as ''Form I-9.''

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In the 27 years since IRCA became law, most employers have learned the I-9 ropes, and many seasoned human resources professionals and employment lawyers can boast a record of attendance at numerous I-9 training and re-training seminars. Some large employers have taken the wise step of including employment verification within their suite of general compliance controls, and some have purchased software tools to ease and improve the employment verification process.

Still, many employers—especially smaller employers with fewer employees and fewer resources—still lag behind in I-9 compliance.

New Enforcement Strategy. On the enforcement side, the Obama administration came to the conclusion that the Bush administration's strategy of raiding homes and businesses and separating families through ''enforcement actions'' aren't the best ways to combat illegal immigration.

Instead, the Obama administration has opted to pursue immigration enforcement—a practical and political prerequisite to expanding immigration benefits—by strengthening border security and increasing employer audits and sanctions in order to create a clear economic disincentive to illegal immigration. Thus, many more employers, large and small, commercial businesses and nonprofit organizations, are now faced with responding to rigorous audits of their I-9 forms by Immigration and Customs Enforcement.

The penalties imposed by ICE for noncompliance are based on a combination of statutory considerations, regulatory fee schedules and internal agency guidance, but, at the end of the day, ICE officers have a good deal of discretion in deciding whether to impose minimal penalties or ''throw the book'' at an employer. Consistent with the administration's push toward stricter enforcement, which has near unanimous support in Congress, ICE often chooses the latter approach, resulting in significant, and sometimes crippling, fines for employers.

Fortunately for many employers, an employer may request review of an unfavorable ICE sanctions determination at OCAHO, and its administrative judges may affirm a sanctions decision, increase the sanctions or reduce the sanctions.

As of June 30, 2013, of the 14 published OCAHO decisions that reviewed the appropriateness of the penalties for the offense, 12 (85.7 percent) of these decisions reduced the sanctions initially imposed by ICE on the employer.

Against this backdrop, it is noteworthy that the first half of 2013 has seen a very large number of OCAHO decisions directing ICE to reduce penalties deemed unfair or excessive under the circumstances. In fact, as of June 30, 2013, of the 14 published OCAHO decisions that reviewed the appropriateness of the penalties for the offense, 12 (85.7 percent) of these decisions *reduced* the sanctions initially imposed by ICE on the employer. In these cases, OCAHO looked to discretionary statutory factors in an effort to try to ''make the punishment fit the crime.''

Size Matters; So Does Good Faith.

Two factors that OCAHO repeatedly scrutinized in its review are the extent to which the penalty was ''proportionate'' to the size of the business and whether the employer acted in bad faith. Indeed, the Immigration and Nationality Act states that, when determining the penalties for I-9 paperwork violations, ''due consideration shall be given to,'' among other factors, ''the size of the business of the employer'' and ''the good faith of the employer.''[1]

While the statute doesn't quantify the extent of ''due consideration'' to be given, an undated ''Form I-9 Inspection Overview,'' prepared by ICE's Worksite Enforcement Unit in approximately 2009, allows for a 5 percent increase or decrease in the fine for each of the factors listed in the statute. However, in its recent decisions, the size of the business and the good faith of the employer each weigh very heavily for OCAHO, significantly more than 5 percent. Moreover, OCAHO seems to go out of its way to interpret ''good faith'' as liberally as possible.

A classic example of this type of review is the decision in *United States v. Taste of China*.[2] In that case, a restaurant in Houlton, Maine, was audited by ICE. At the time the records were inspected, the restaurant had 10 to 14 employees. While ICE found that all of the employees were authorized to work in the U.S., the overwhelming majority of the I-9 forms weren't completed correctly, and in one case there was no I-9 form at all.

Despite the sweeping extent of the paperwork violations, OCAHO disagreed with ICE that the employer had shown bad faith. It further directed the penalty to be reduced by more than 60 percent, from $13,090 to $5,100, noting that the penalty calculated by ICE appeared disproportionate to the size and character of the ''mom and pop'' business.

Penalties Found Disproportionate. OCAHO applied similar considerations in a more egregious case, *United States v. Nebeker, Inc.*[3] ICE had inspected the documents of a Layton, Utah, company with seven employees, finding that the company had knowingly employed three unauthorized workers and that nearly all the I-9 forms were completed incorrectly. OCAHO went out of

[1] *See* INA § 274A(e)(5). The other three factors are the seriousness of the violation, whether the individual was an unauthorized alien and the history of violations.

[2] 10 OCAHO no. 1164 (2013).

[3] 10 OCAHO no. 1165 (2013).

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its way to point out that, under the case law, a poor rate of I-9 compliance is insufficient to show a lack of good faith. It also found that the penalties assessed were so near the maximum permissible as to appear disproportionate to the size and character of the employer.

Thus, the penalties were reduced from $22,627 to $10,800.

In *United States v. Seven Elephants Distributing Corp.*,[4] OCAHO held that, despite the failure of the company, which imported and sold consumer electronics, to properly complete 34 I-9 forms and its hiring of seven unauthorized workers, the penalty listed by ICE was disproportionate to the company's size and status.

The fine in that case was reduced from $34,969 to $14,500, nearly 60 percent.

'Bad Faith' Interpreted Narrowly. Even without a ''disproportionate'' finding, OCAHO has shown that it will interpret ''bad faith'' as narrowly as possible when faced with a struggling, small employer.

In *United States v. La Hacienda Mexican Café*,[5] a Mexican restaurant in Imperial Valley, Calif., failed to complete *any* I-9 forms, explaining that it simply was unaware of the requirement. While OCAHO agreed that the violations were serious, it found that there was no bad faith because the proprietor wasn't aware of the I-9 requirement.

Citing the lack of bad faith, the absence of any unauthorized workers and no prior history of violations, OCAHO reduced the fine from $22,440 to $9,600, noting that the maximum penalties should be reserved for more egregious circumstances than a poor rate of I-9 compliance. OCAHO also noted that the company had stated that it was ''barely making it,'' a striking example of OCAHO's reluctance to cripple small businesses, even with a 100 percent violation rate.

The most significant reduction in penalties was in the case of *United States v. Siwan & Sons, Inc.*,[6] where OCAHO liberally defined ''small business'' and pushed back on the government's bad faith determination. It went as far as to say that bad faith wasn't shown simply because ICE chose to disbelieve the employer's explanation for completing the forms late.

The business, which operated two Subway restaurants in North Carolina, failed to properly complete I-9s for 72 employees, and seven employees had no I-9 at all. Yet, OHACO found that, as a small business that had not shown bad faith, the penalty should be reduced from $82,280 to $15,800.

Save the Higher Fines for the Bad Guys.

In addition to emphasizing size and good faith, the first half of this year saw OCAHO apply a general principle that, when there is discretion in the assessment of a penalty, the highest level penalties should be reserved for the worst violators.

For example, in *La Hacienda Mexican Café*, despite the employer's failure to complete any I-9 forms, OCAHO said ''[p]enalties at or near the maximum permissible should be reserved for more egregious circumstances than are reflected here.''[7]

This position was articulated again in *United States v. Fowler Equipment Co.*[8] In that case, penalties assessed against a small Union, N.J., company in the business of selling and servicing laundry equipment were reduced from $77,418 to $41,000, despite OCAHO finding 76 violations and agreeing that they were serious.

By contrast, OCAHO has increased penalties for employers that knowingly disregard the law. A good example is the decision in *United States v. Occupational Resource Management, Inc.*[9] The employer in that case was found to have knowingly employed unauthorized employees, backdated I-9 forms and committed many I-9 violations.

OCAHO increased the penalty for the ''knowing hire'' violations beyond the amount assessed by ICE, pointing out that ''such violations are by definition not committed in good faith and are never less than extremely serious.''

Reduced Fines Continue in Summer. The liberal decisions observed at OCAHO in the first half of the year have continued through the summer, with decisions still significantly reducing penalties in cases where the employers are small and lack bad faith.

In the Aug. 20 decision in *United States v. Platinum Builders of Central Florida, Inc.*, OCAHO reduced a $70,967 penalty assessed by ICE to a construction company to $23,700, finding that a ''dismal rate of I-9 compliance'' can't be used ''to increase a penalty based upon the good faith criterion.''[10]

The decision also quoted *La Hacienda Mexican Café* and *Fowler Equipment Company*, and reaffirmed that ''[p]enalties at or near the maximum permissible should be reserved for most egregious violations.''

Similarly, in the Aug. 7 decision in *United States v. New Sun Transit, Inc.*,[11] OCAHO reduced a Mexican restaurant's penalty from $36,184 to $16,600 even though it found 43 violations and agreed with ICE that the violations were serious. It wrote that ''[p]enalties of such magnitude should be reserved for employers that act in bad faith or hire unauthorized workers, not for those that act in good faith and hire only authorized workers.''

The take-away for employers is two-fold:

- ICE takes I-9 compliance very seriously, so you should too. Otherwise, it can get quite expensive.

- Even in the regulatory minefield of I-9 compliance, good faith counts. Therefore, if an employer handles its compliance responsibilities carefully and professionally, it can expect OCAHO to be sympathetic, especially if it is a small business.

[4] 10 OCAHO no. 1173 (2013).
[5] 10 OCAHO no. 1167 (2013).
[6] 10 OCAHO no. 1179 (2013).
[7] 10 OCAHO no. 1167 (2013).
[8] 10 OCAHO no. 1169 (2013).
[9] 10 OCAHO no. 1166 (2013).
[10] 10 OCAHO no. 1199 (2013).
[11] 10 OCAHO no. 1194 (2013).