

ICE ICE Baby **(With a Splash of DOL)**

- **ICE Enforcement trends**
- **E-Verify updates, trends and best practices**
- **DOL Public Access File Audits**
- **DOL H-1B Investigations and limits on investigative authority (Volt Management Corp case)**
- **Tips on helping clients through an Audit or Site Visit**

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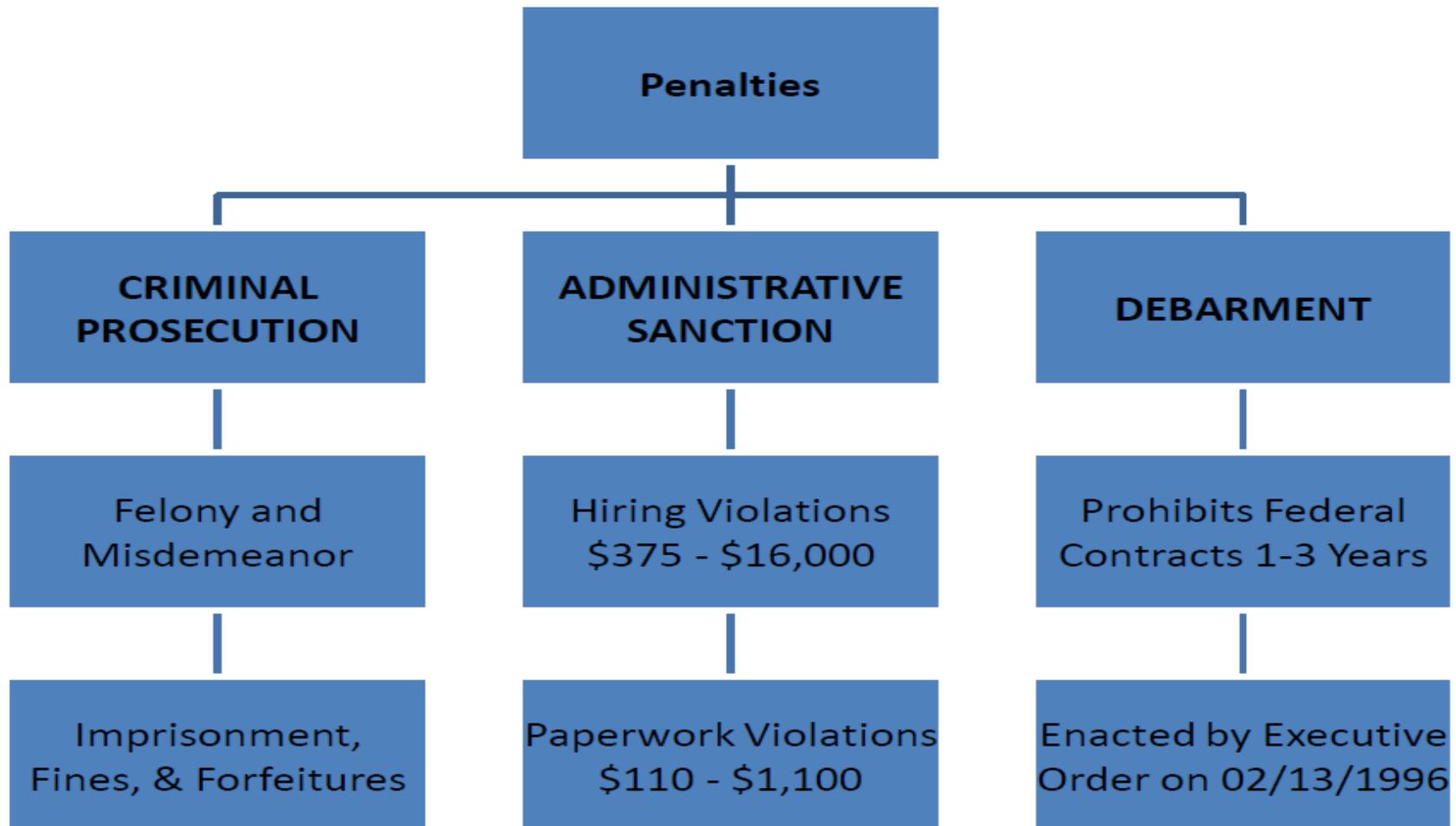
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Updates: The New I-9

- **I-9 used to verify that the Employer has confirmed the identity and work authorization of all employees**
- **New I-9 to be released by November 22, 2016**
- **Still a two-page form**
- **Updates to information captured and format**
- **New form MUST BE USED for all new-hire employees hired January 22,2017 and after**

Updates: Increased Fines & Worksite Enforcement



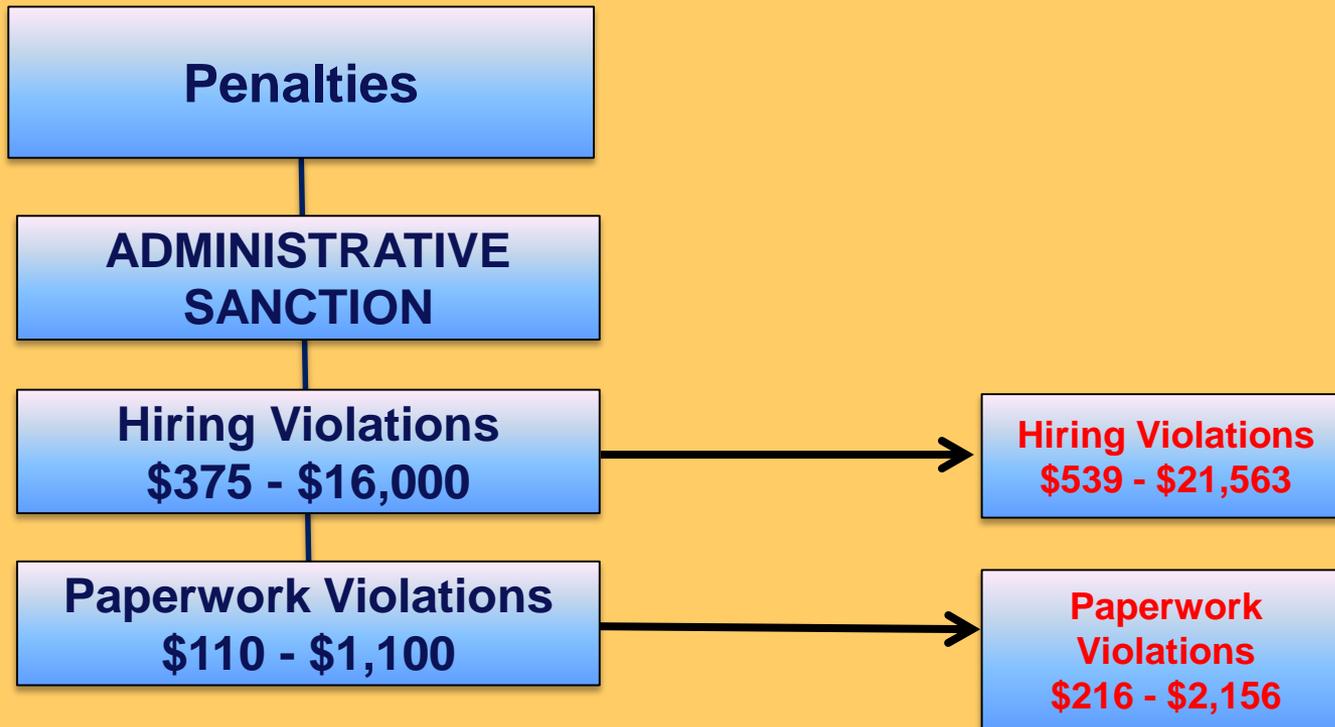
Final Orders and Civil Fines - FY2008 - 2015

FISCAL YEAR	FINAL ORDERS ISSUED	CIVIL FINES EMPOSED
2008	18	\$675,209
2009	52	\$1,033,291
2010	238	\$6,956,026
2011	385	\$10,463,988
2012	495	\$12,475,575
2013	637	\$15,808,365
2014	642	\$16,275,821
2015	513	Over \$16 Million

Criminal Fines & Forfeitures, Worksite Enforcement Investigations, FY 2008 - 2015

FISCAL YEAR	CRIMINAL FINES / FORFEITURES IMPOSED
2008	\$21,978,918
2009	\$31,244,945
2010	\$36,611,320
2011	\$7,189,631
2012	\$14,205,865
2013	\$2,245,366
2014	\$35,131,058
2015	\$35,000,000

Revised Fines



ICE AND ENFORCEMENT TRENDS

ROLE OF ICE ATTORNEYS IN WORKSITE ENFORCEMENT CASES

- OCC attorneys are assigned to teams which handle worksite enforcement
- the attorneys provide assistance to ICE special agents concerning the investigation and preparation of worksite enforcement cases
- attorneys are tasked with reviewing worksite enforcement cases for legal sufficiency under the requirements set forth in INA Section 274A

ROLE OF ICE ATTORNEYS IN WORKSITE ENFORCEMENT CASES

--if the employer does not request a hearing before an ALJ within 30 days of personal service of the NIF or 35 days if the NIF was served by ordinary mail, the attorneys will prepare a Final Order requiring the employer to pay the civil money penalty assessed in the NIF

--in most cases, the employer will reach a settlement with ICE

--in contested cases, ICE attorneys are responsible for filing a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO)

OCAHO I-9 Case (Oct. 2016)

USA v. Solutions Group, 12 OCAHO no. 1288 (Oct. 20, 2016)-

"The government met its burden of proving that Solutions Group International, LLC, is liable for eighty four violations of 8 U.S.C. § 1324a(a)(1)(B). Respondent is directed to pay civil money penalties in the total amount of \$56,150."

USA v. St. Croix Personnel Services, 12 OCAHO no. 1289

(Oct. 21, 2016) - "ICE proved by a preponderance of the evidence that St. Croix Personnel Services, Inc. is liable for nine violations of 8 U.S.C. § 1324a(a)(1)(B). St. Croix Personnel Services, Inc. is directed to pay civil money penalties in the total amount of \$5450."

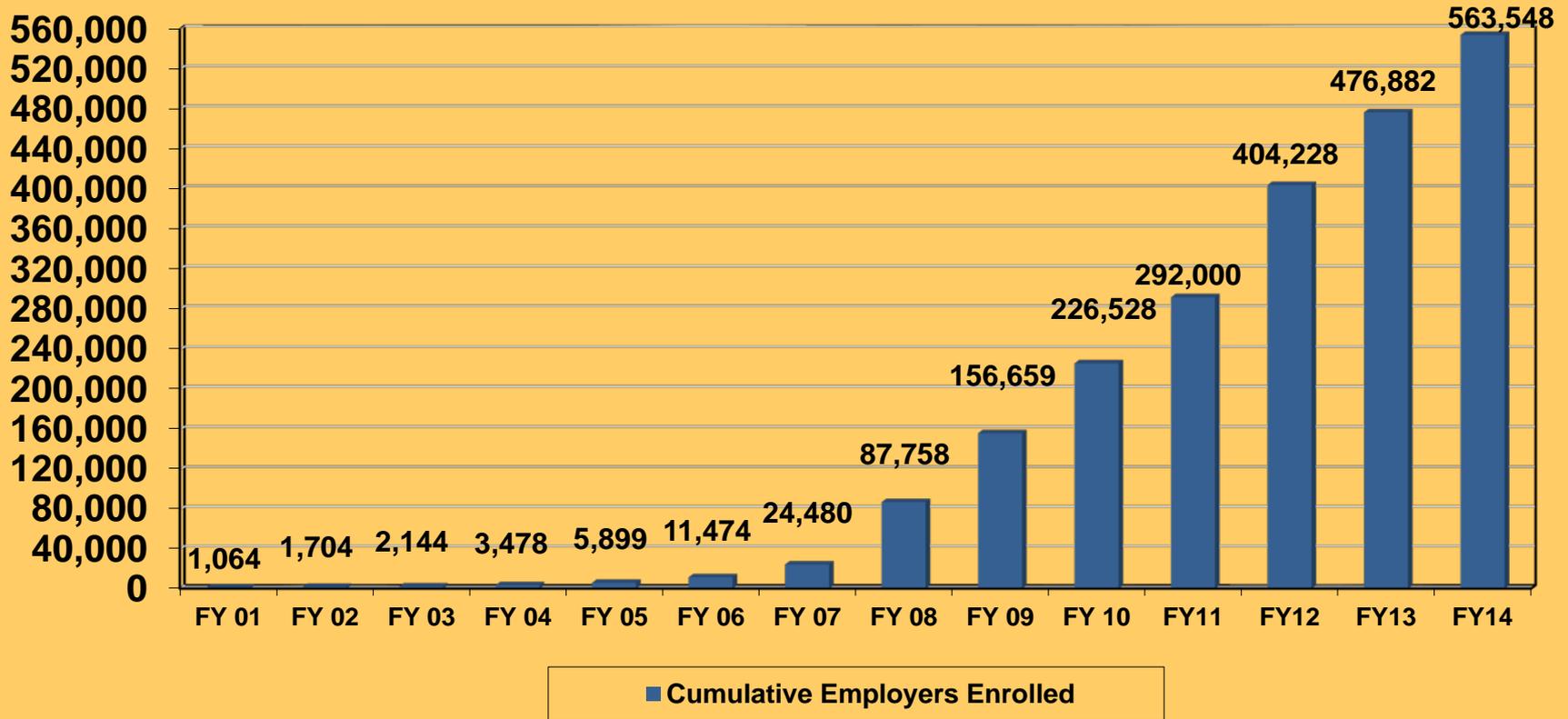
OCAHO Cases (Oct. 2016)

***USA v. Frimmel Management*, 12 OCAHO no. 1271c (Oct. 26, 2016)** - "Frimmel Management not only failed to prepare and/or present close to 300 Forms I-9, multiple Forms I-9 that the company did complete were overall so deficient that they rendered the I-9 essentially useless. Furthermore, the penalty amount for the 53 Count II and the 2 Count IV violations involving unauthorized aliens will be aggravated to \$1000 per violation to reflect that IRCA's employment verification scheme was completely undermined by the employment of unauthorized workers. The penalty amount for these 55 violations is therefore \$55,000. Accordingly, the total civil money penalty for all 380 paperwork violations in Counts I-IV is \$347,500."

E-Verify Updates, Trends and Best Practices

- **E-Verify is a free government database that confirms work authorization data to government databases (SSA, DHS, SAVE, etc.)**
- **Does not replace the Form I-9**
- **Mostly likely to become national but already required in various jurisdictions**
- **Sometimes provides leverage for ICE negotiations**
- **Provides opportunity for data collection by the Office of Special Counsel and other agencies**

The Growth of E-Verify



- **More than 28 million cases run in FY 2014**
- Employers in every industry, state and U.S. territory
- Several states enacted E-Verify legislation to go into effect in 2012-2013

OSC Trends

- **Complaint driven:**
 - Injured parties file discrimination charges directly with OSC's Washington, D.C. office within 180 days of the alleged act of discrimination.
- **Independent investigations:**
 - Based on information developed during complaint investigation, leads from other agencies or general public.
- **NPRM issued August 15, 2016:**
 - Expand DOJ authority to investigate charges within 5 YEARS of alleged violation.
 - Expand investigative authority.
 - Expand definition of discrimination based on “citizenship status” to also include “immigration status.”



Watch Out!



Concerned with discrimination based on document abuse, immigration status, or national origin? Examples of prohibited conduct:

- Overdocumentation (metrics!);**
- Taking adverse action against certain workers while they are contesting E-verify TNC's or FNC's;**
- Failing to inform workers they received E-verify TNC's;**
- Demanding to see “green cards;”**
- Re-verifying green cards;**
- Demanding specific I-9 documents.**

DOL, H1B, PAF Audits, Investigations and Limits Who, What, Where, When and How?

- DOL Public Access File Audits
- DOL H-1B Investigations and Limits on Investigative Authority

The DOL PAF and H1B Audit or Investigation

History: 1991 - LCA intended to protect wages and working conditions of U.S. workers from cheaper imported foreign labor (...and protect foreign workers from abuse).

- **Struggle how to translate this principle into a workable enforcement regime**
- **Can get an LCA certified, but unsure of a Wage and Hour audit.**
- **Certain the public inspection folder is there, and is correct?**
- **DOL has never published a sample public access/inspection, but DOL web information.**
- **Increased enforcement as DOL, ICE, etc. all MOU on LCA's, Form I-9's and unauthorized employment**

Today

- **Common: Complaint driven for failure of the employer to pay the required salary or deal with benching issues (to date few labeled “willful” and/or result in disbarment).**
- **List of disbarred employers:**
<http://www.dol.gov/esa/whd/immigration/H1BDebarment.htm>
- **List willful violators:**
<http://www.dol.gov/esa/whd/immigration/H1BWillfulViolator.htm>
- **DOL Wage and Hour Audit: WH-4 H-1B Complaint Form**
<http://www.dol.gov/esa/forms/whd/WH-4.pdf>

Contents of the **Public Access File**

- 1. LCA (Form 9035) completed, signed, & w/cover pages**
- 2. Wage Rate Statement**
- 3. Actual Wage Memorandum**
- 4. Prevailing Wage Documentation**
- 5. Summary of benefits offered to U.S. workers and an explanation of differentiation in benefits if H-1B worker is not receiving same benefits as U.S. workers**
- 6. Evidence of LCA Posting given to union or employee**

If applicable:

- 7. Statement re: change in corporate structure**
- 8. Relevant documentation for H-1B Dependent employer**

DOL WAGE and Hour Focused Area:

- **What fees/costs must an employer pay and what can be passed on to an employee both at the time of hire and after they leave employment? For example can the employee pay the premium processing fee?**
- **How do you determine the correct wage level from an alternative salary survey?**
- **What are the rules concerning deductions from an H-1B worker's pay?**
- **What benefits must be offered to H-1B workers?**
- **What are the employers' posting and notification requirements?**
- **How often and under what circumstances does the employer have to update the public inspection folder?**

Can the DOL Investigation Spread?

- Employment and Training Administration (ETA) (approves LCA)
- U.S. Citizenship and Immigration Services (approves H-1B visa classification)
- Department of State (issues the visa)

- **The US DOL Wage and Hour Division enforces the employer's LCA obligations**
 - a. H2A and H2b
 - b. IRS and DOL
 - c. DOS and DOL
 - d. DOL Task Force -- November 2014
 - e. Fraud Detection National Security

- U.S. v. Tabafunda, 10/16/12 AILA Doc. No. 12110856
- Greater Missouri Medical Pro-Care Providers Inc. v. Thomas E. Perez, 14-3717, 8th Circuit
- Administrator, Wage and Hour Division v. Volt Management Corp., 2012-LCA-00044
- Moore v. Cognizant Technology Solutions et al.(case number [6:16-cv-00113](#), U.S. District Court for the Middle District of Florida)

- **When can WH initiate an H-1B investigation?**
- **What are the major mistakes that employers are still engaging in that result in audits?**
- **What are the major mistakes that employers are still engaging in that result in audits?**

An employer receives a letter from DOL when an investigation is started.....

The DOL letter:

- Indicates that DOL has reasonable cause to conduct an investigation
- Asks the employer to have the documentation available for inspection (specific day and time).
- Key take-aways...

Documents requested typically include:

- **1) Copies of all LCAs submitted to, approved by the U.S. Department of Labor/Employment Training Administration that are still in effect, as well as any other LCAs required; and**
- **2) Copies of all complete USCIS packages for each H-1B employed during the time period specified (which would include the person or persons under whom the complaint was initiated); former and current employees. With respect to each of these employees DOL will seek:**
 - a) The full name of each employee;**
 - b) Social security number;**
 - c) current address;**
 - d) the date entered into the U.S. if you were the sponsor;**
 - e) the date commenced work;**
 - f) the date commenced payroll;**
 - g) each worksite location by city and state and period of employment at each site for each H-1B employee;**
 - h) LCA's, I-129 and any subsequent accompanying letter, and I-797;**
 - i) the dates of any unpaid periods including the documentation supporting your position that they were not entitled to be paid;**
 - j) Fringe benefits;**
 - k) the date of termination;**
 - l) Copy of the termination notice to CIS, if applicable;**
 - m) any liquidated damages or penalties sought or collected**

Continuation of the documents requested typically include:

- **3) Payroll records for the last two years for all employees (H-1B and domestic) employed in occupations stated on the LCAs including IRS form W-2 annual totals for the last year for all these employees**
- **4) Copies of the documents used to establish the prevailing rate. If published or employer survey was used, provide the documentation of the universe of data used, the method of computing the rate, and the locality of the rate.**
- **5) Copy of the documentation of your actual wage system;**
- **6) Copies of the appropriate documentation that each LCA was properly posted.**
- **7) Summary of benefits offered to U S workers.**
- **8) List of entities included as a “single employer”.**
- **9) For H-1B dependent and/or willful violator employer: list of exempt H1B workers/summary recruitment efforts.**
- **10) In the event of a change in corporate structure, within the past two years, the following information will be needed;**
 - **a) sworn statement by successor entity accepting all liabilities of predecessor entity;**
 - **b) list of H-1B workers transferred to successor entity;**
 - **c) each affected LCA number and effective date;**
 - **d) successor entity’s actual wage computation, and**
 - **e) successor entity’s employer identification number (EIN)**

Action Items Once Engaged Because of the the DOL letter/audit/investigation

- 1. Go to client's office & review PAFs, Payroll Records, H-1B Petitions**
 - Determination of proper wage; title used & how job description impacts wage determination and level, as well as geographic location**
 - Evidence of PW acceptable**
 - H-1B Salary vs. US workers salary in same position**
 - PT vs. FT**
- 2. Discuss practices of employer regarding payment of wages, time off (leaves of absence), moving employees**
 - Benching**
 - Wages Paid (cash in hand)**
 - Authorized deductions**
 - Dependent Employer?**
- 3. Provide assessment of potential violations and liability**
- 4. Prepare mitigating factors/defense for DOL**

Issues to Consider:

- Opening – Notice or Conference ---- **ASK the Right questions/Scope and then assess**
- On-Site Inspection Activities
- Day of the DOL investigation
- Employee Interviews
- Closing – Notice, Conference, Findings, Options
- Post-Audit Considerations
- Retention of Records
- Other DOL “Immigration” Law Related Audits – Investigations,

Other important considerations: ethics, best practices, cures, protection of evidence, can the audit/investigation spread, conformation, Notification, Clarify the scope of the investigation.

The investigator may be seeking records with respect to one issue, LCA, or other categories of workers and other issues

Employers’ right - have designated representative present when the DOL is on site, credentials, ask DOL to return on another day, 72 hours to respond, demand a subpoena instead of consenting, unannounced and the records sought to be not be on premises and consenting but clarify scope of the audit , DOL’s on-site investigation at reasonable times, reasonable manner, not interfere with normal business operations, Document Production: redacted? delete addresses, social security numbers, or other information irrelevant to the investigation? label documents produced with the “Confidential and Proprietary,” , add identify numbers for tracking and for future reference, address trade secret or confidential business records, valid request or not? produce documents under cover including confidentiality and proprietary protections, keep duplicates of every record produced, do *not* generate privileged, do *not* give more than requested (plain sight), volunteer information – may create confusion without context, DOL Field manual- ...

- “cooperation”...:

DOL - Assessing a Penalty/Case Closure

- **DOL will likely issue a press release.**
- **Pay the amount without question and accept the DOL's findings.**
- **Resolve disputed findings and negotiate reduced amounts at an informal settlement conference with the WHI or supervisors.**
- **Contest the findings and negotiate a formal settlement with the DOL counsel.**
- **Contest the findings, prepare the defense, and proceed to trial in court.**

Issues and Consequences

- **facts of alleged violations accurate?**
- **facts amount to an actual violation of law?**
- **based on an untested assertion ?**
- **based on incorrect DOL interpretation ?**
- **proposed penalties excessive?**
- **related facilities at issue?**
- **bar to other DOL programs?**
- **other programs at issue? FAR?**
- **contract or morality clause issues?**
- **corrective action—Notice actions?**

DOL factors to consider when assessing a fine:

- Previous history of violations;**
- Number of workers affected by the violations;**
- Gravity of the violation;**
- Employer’s good faith compliance efforts;**
- Employer’s explanation’**
- Employer’s commitment to future compliance; and,**
- The extent of financial gain the employer may have received.**

Tips for Helping Clients: Audits and Site Visits



- Annual (or more frequent) I-9 and E-Verify Training
- Supervised Audit of I-9 and E-Verify Paperwork
- First Responder Protocols for Government Visits – Who to call, what to collect, what to protect!
- Make sure that LCA public access files for H-1B workers are compliant, and undergo routine file audits
- Keep each employee's immigration paperwork separate from his/her personnel files and payroll records
- Keep records for contract workers separate from actual employees – if a site visit concerns a contract worker, make sure you have contact information for the employer of that worker, and request that the officer contact the employer
- Advise the employee and his/her supervisor that a site visit is possible, and provide the employee with a copy of his visa paperwork
- Make sure your first-responders and responsible parties receive regular training to address government visits and inquiries