

Immigration Compliance Auditing for Lawyers

Charles M. Miller, Marcine A. Seid, S. Christopher Stowe, Jr.

The immigration compliance responsibility placed on employers by the federal government can be overwhelming. This cutting-edge resource provides authoritative, step-by-step guidance for conducting immigration compliance audits under the Department of Homeland Security regulations and related employment laws. The authors are distinguished attorneys who have led the development of model immigration compliance auditing standards for the use of the Congress, the judiciary, federal agencies, and bar associations.

Immigration Compliance Auditing for Lawyers contains an authoritative analysis of the latest federal law and policy required for competent, independent, and ethical immigration compliance auditing. This essential book will provide you with the necessary tools and resources needed for an audit, including the auditing of I-9 Forms, compliance programs, employers' civil and criminal liability and anti-discrimination; also included is a CD containing all the significant forms and guidelines. From the I-9 Audit Checklist to the Auditor's step-by-step Guide, auditors are provided an integrated auditing system that incorporates the latest ICE policies and OCAHO decisions.

About the Authors

Charles M. Miller is the Chair of the Compliance Auditing Standards Taskforce established by the American Immigration Lawyers Association to create model U.S. standards for the best practices and ethics for worksite enforcement compliance auditing. He is a former INS attorney and current principal of the Miller Law Offices.

Marcine A. Seid currently serves as an elected member of the Board of Directors of AILA. Ms. Seid is also a member of the Compliance Standards Task Force, is a frequent national speaker and author, and practices at the Law Offices of Marcine Seid.

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Foreword by Paul W. Virtue



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Charles M. Miller is the Chair of the Compliance Auditing Standards Taskforce established by the American Immigration Lawyers Association to create model U.S. standards for the best practices and ethics for worksite enforcement compliance auditing under the Department of Homeland Security regulations and related employment laws.

Charles Miller is a principal of the Miller Law Offices, Studio City, California, www.millerlawoffices.com, ranked as a 2010 top-tier immigration law firm by U.S. News and World Report.

Mr. Miller served on the California State Bar's first Specialty Advisory Commission, both as member and chairman. The Commission administers the Immigration and Nationality Law legal specialization, for the examination, certification and recertification of specialist attorneys. He has served as a member of the State Bar's Board of Legal Specialization administering all the California legal specialties.

Mr. Miller has been the recipient of the American Immigration Lawyers Association's Jack Wasserman Memorial Award for excellence in immigration litigation. He has served on AILA's national Board of Directors, as well as its Southern California Chapter Chair.

A former INS attorney, Charles Miller has been recognized in *Super Lawyers*, *Super Lawyers Corporate Counsel Edition*, and *The Best Lawyers in America* (1991-present). He is a co-author of *Immigration Law in the Workplace* (Aspen publishers).

Marcine A. Seid currently serves as an elected member of the Board of Directors of AILA. Ms. Seid is currently a member of the Compliance Standards Task Force established by AILA to create model U.S. standards for the best practices and ethics for worksite enforcement compliance auditing. She has served as the AILA Chapter Chair for the Silicon Valley Chapter.

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Mr. Stowe is a frequent speaker on business related immigration topics at national CLE seminars including the annual conferences of AILA. He has served on AILA's Board of Directors and chaired AILA's Vermont Service Center Liaison Committee. Mr. Stowe's involvement as the Chair of the AILA Finance, Strategic Planning and Investment Committees were key to the bar association's ownership of the first building housing its national headquarters. His practice

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❖ PREFACE

IMMIGRATION COMPLIANCE AUDITING FOR ATTORNEYS

The American Bar Association's cutting-edge resource book provides authoritative, step-by-step guidance for conducting immigration compliance audits under the Department of Homeland Security regulations and related employment laws.

The authors, Charles M. Miller, Marcine A. Seid and S. Christopher Stowe, Jr., are distinguished attorneys who have led the development of model immigration compliance auditing standards for the use of the Congress, the judiciary, federal agencies and bar associations.

IMMIGRATION COMPLIANCE AUDITING FOR ATTORNEYS contains their authoritative analysis of the latest federal law and policy required for competent, independent and ethical immigration compliance auditing. This book provides you with the necessary tools and resources needed for immigration compliance auditing including the auditing of I-9 Forms, compliance programs, employers' civil and criminal liability and anti-discrimination. From the I-9 Audit Checklist to the Auditor's step-by step Guide, auditors are provided an integrated auditing system that incorporates the latest ICE policies and OCAHO decisions.

Because of the importance of the book to employer compliance with federal and state immigration laws, the American Bar Association is offering volume discounts to its members, government offices, law schools and non-profit associations.

❖ EXCLUSIVE TOOLS AND RESOURCES

IMMIGRATION COMPLIANCE AUDITING FOR ATTORNEYS contains innovative tools and resources for competent, objective and independent external immigration compliance auditing:

- I-9 Audit Checklist with an Auditor's Guide "How to Use the I-9 Auditor's Checklist" with item-by-item authoritative notes to auditors based on the latest ICE policy and OCAHO decisions.
- Chronological I-9 and Document Lists
- I-9 Forms and Revisions
- Employer Audit Documentation List
- Reference Document List to Discover Missing I-9s

- Composite List of Substantive and Technical and Procedural Failures
- ICE Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties
- Complete Virtue Memorandum with all appendices
- Complete coverage of the ICE Penalty Guidelines and comparison with the latest leading OCAHO penalty cases
- Liability Auditing guidance with step-by-step penalty formula explanation

❖ **LATEST AUTHORITATIVE GUIDANCE AND EXPERT ANALYSIS**

- The Current I-9 Forms and the Unexpired Document Interim Rule
- The latest List of Documents
- The Receipt Rule including the current refugee policy
- The latest Temporary Protected Status (TPS) policies
- Paperwork Continuing Violations
- Timeliness Violations
- Knowingly Hired or Continuing to Employ Violations
- ICE IMAGE Program Participation
- Audit Discovery of Fraud or Criminality
- Remediation and Mitigation
- The IIRAIRA Good Faith Paperwork Violation Defense and the *Virtue Memorandum*
- Mixed Technical, Procedural and Substantive Failures
- OCAHO Case Recognition of the *Virtue Memorandum*
- Missing Forms I-9
- Remediation For Timeliness and Paperwork Violations
- Discovery and Remediation of Knowingly Hire and Continuing Employment of Unauthorized Employees and Pattern and Practice Violations

Foreword

As we approach the twenty-fifth anniversary of the Immigration Reform and Control Act (IRCA) of 1986, widely publicized increases in the enforcement efforts of the Department of Homeland Security (DHS) have brought renewed attention to the need for compliance. If you represent one of the estimated eight million private employers in the United States, you likely already know that your client is responsible for verifying the employment authorization of each new employee hired and that it would be prudent for your client to conduct an independent audit of its compliance with that responsibility before DHS serves a notice to inspect your client's records. What you may not know is how to design an audit that will put your client in the best position if the agency should come knocking. This comprehensive resource book contains everything you will need to do just that and more, as the authors offer guidance on such other important issues as compliance with labor certification and H-1B rules as well as risks relating to immigration fraud and misrepresentation. I am delighted to have been asked to review it and I wholeheartedly endorse it as an indispensable tool for your law practice.

I began my government career in the Immigration and Naturalization Service Office of the General Counsel in August 1983, some three years before the enactment of IRCA. Implementation was slow at first and enforcement was non-existent as we spent the first two years following enactment, educating employers about their new responsibilities, issuing warning notices rather than fines. Even after the education period ended enforcement of sanctions against employers for hiring unauthorized workers was a poorly funded mandate that fell to a corps of some 1,000 investigators who were also responsible for investigating alien smuggling, arresting undocumented aliens, and enforcing the criminal provisions of the Immigration and Nationality Act. With the 1996 Illegal Immigration Reform and Individual Responsibility Act (IIRIRA) came a new emphasis on enforcement, and funding for more robust enforcement of sanctions against employers followed. In March 1997, during my tenure as Acting Executive Associate Commissioner for Programs, we issued what was intended to be interim guidance for our officers in administering the good faith paperwork violation policy that had been enacted as part of IIRIRA. Recently the Immigration and Customs Enforcement (ICE) bureau of DHS has confirmed that it continues to follow that interim guidance and, as you will see, the authors have faithfully incorporated the purpose of that guidance in their set of auditing principles. As this publication goes to print, ICE has made clear that it has turned its focus away from arresting large numbers of undocumented workers in the workplace to auditing of employer compliance with the employment verification and anti-discrimination requirements of IRCA. Employers in all sectors are well advised to be prepared.

The authors are seasoned immigration practitioners who bring a combined 87 years of experience to the development of the auditing principles contained in this publication. Chuck, Marcine and Chris each have served in senior leadership positions within the immigration bar and, in the case of Chuck, the California State Bar, and all three are well respected by their colleagues for their intellect and ability to offer clear and effective advice to their clients. The result of their combined efforts is a sensible set of auditing

principles, the first of its kind, developed under the auspices of the American Bar Association, with the stated purpose of engendering effective nationwide employer compliance with federal law. In my view, the compendium they have prepared for your use will enable you and your clients to achieve that ambitious goal with confidence.

—Paul W. Virtue

Introduction

The Immigration Reform and Control Act of 1986 gave employers the responsibility of implementing an employer verification system to check the identity and employment authorization of newly hired employees. An estimated 8 million employers¹ have the responsibility to verify and maintain I-9 forms according to the regulations of the INS and its successor agency, the Department of Homeland Security.²

On July 1, 2009, John Morton, the Department of Homeland Security Assistant Secretary for U.S. Immigration and Customs Enforcement (ICE) announced that the agency had issued Notices of Inspection to 652 employers nationwide to initiate the administrative I-9 inspections. This policy announcement marked a shift in enforcement emphasis from the Bush administration's policy of emphasizing criminal investigations of employers suspected of violating the federal immigration employment laws by the use of criminal search warrants based on probable cause, which do not require advance notice. On November 19, 2009, Assistant Secretary Morton announced that ICE had issued an additional 1000 I-9 inspection notices to employers in critical infrastructure industries.³ On March 2, 2010, ICE announced its plans to issue an additional 180 Notices of Inspection to employees in Louisiana, Mississippi, Alabama, Arkansas and Tennessee.⁴

This wave of administrative inspections focused on the audits of employers' Forms I-9 seeking out deficiencies in the verification and attestation records. Rather than a substitute for

¹ GAO-05-259 (Feb. 18, 2008).

² The Legacy Immigration and Naturalization Service (INS) was the primary agency responsible for the administrative enforcement of the employer's sanctions laws until the Homeland Security Act of 2002 created the successor enforcing entity, the Immigration and Customs Enforcement (ICE), a component agency of the Department of Homeland Security (DHS). Pub. L. No. 107-296, Title IV, Subtitles C-F, 116 Stat. 2135 (Nov. 25, 2002).

³ ICE News Release (Nov. 19, 2009) found online at <http://www.ice.gov/pi/nr/0911/091119/washingtondc2/htm>.

⁴ ICE News Release (March 2, 2010) found online at <http://www.ice.gov/pi/nr/1003/100302neworleans.htm>.

criminal investigations, Assistant Secretary Morton emphasized that the results of the agency's I-9 auditing would serve as a groundwork for civil penalties and criminal prosecutions for employer violators:

Audits involve a comprehensive review of Form I-9s, which employers are required to complete and retain for each individual hired in the United States. I-9 forms require employers to review and record each individual's identity and work eligibility document(s) and determine whether the document(s) reasonably appear to be genuine and related to that specific individual.

Protecting employment opportunities for the nation's lawful workforce and targeting employers who knowingly employ an illegal workforce are major ICE priorities, for which ICE employs all available civil and administrative tools, including audits. Audits may result in civil penalties and lay the groundwork for criminal prosecution of employers who knowingly violate the law.⁵

This change of worksite enforcement priorities was one of the topics Assistant Secretary Morton elaborated on in his testimony in support of the ICE Fiscal Year 2011 budget request before the Senate Appropriations Committee on March 18, 2010:

In April 2009, ICE marked a clear shift in its strategy in enforcing immigration law, by focusing investigations on employers who knowingly hire unauthorized workers and exploit their workforce. Our goal is to foster a culture of compliance by deterring employers from hiring unauthorized workers, penalizing those who violate the law and encouraging employers to use compliance tools, such as E-Verify. By better focusing our efforts, we were able to target employers who hire unauthorized workers for criminal prosecution and civil fines through criminal investigations and by auditing companies' Employment Eligibility Verification forms (Forms I-9).⁶

⁵ ICE News Release, "ICE Assistant Secretary John Morton announces 1,000 new workplace audits to hold employers accountable for their hiring practices" (Nov. 19, 2009), online at <http://www.ice.gov/pi/nr/0911/091119washingtondc2.htm>.

⁶ Testimony of Department of Homeland Security Assistant Secretary John Morton Before the Senate Appropriations Committee on the U.S. Immigration and Customs Enforcement Fiscal Year 2011 Budget Request, online at http://www.dhs.gov/ynews/testimony/testimony_1271443011074.shtm (March 18, 2010).

It is thus clear that the Obama administration returned nationwide administrative civil sanctions to the forefront of the Department of Homeland Security's Worksite Enforcement Program.

IMMIGRATION COMPLIANCE AUDITING FOR ATTORNEYS addresses the current needs of American Bar Association attorneys to insulate their employer clients from ongoing liability for past errors and to proactively implement programs for current and future immigration law compliance. The lynchpin of the immigration compliance program is the external compliance audit, designed to provide the attorney auditor's independent assessment regarding a client employer's compliance under the applicable laws. The components of the immigration compliance audit, including the Form I-9 audit, the compliance program audit and the liability audit are examined in detail in the book's chapters. You will find immigration compliance auditing principles that provide the crucial framework for conducting audits and other engagements. The book's principles represent the underlying aspiration that attorneys conduct immigration compliance audits with competence, objectivity and independence. It is the authors' hope that the book's chapters provide ethical guidance for auditing and reporting that will lead to efficient and effective legal compliance by employers.

For management and their legal counsel, some components of the immigration compliance audit will have become familiar procedures from the immigration due diligence that precedes mergers, acquisitions, IPOs and other company restructuring events. Now, however, all U.S. employers face enhanced responsibilities to effectively comply with recent agency changes to the Form I-9 and the lists of acceptable documents. Certain government contractors and subcontractors have been required to join the E-Verify electronic verification system which augments the I-9 attestation and maintenance responsibilities. These new compliance duties

require that the employer adopt an effective worksite enforcement compliance strategy. The efficient execution of this compliance plan must be a high priority. By the time there is an ICE worksite enforcement action, remediation and any possible negotiations will be under the supervision of the DHS and/or the U.S. Attorney's office in the city where the enforcement action takes place.

It would be a mistake for employers to reduce compliance efforts because of the Obama administration's return to the primacy of administrative civil sanctions as an enforcement tool of choice. The April 30, 2009 ICE Office of Investigations Worksite Enforcement Strategy memorandum reemphasized that the agency's worksite enforcement operations, including the criminal prosecution of noncompliant employers, the removal of an unauthorized workforce and the debarment of government contractors, would remain significant deterrence options.⁷

Nevertheless, the ICE Worksite Enforcement strategy memorandum emphasizes that administrative I-9 inspections remain the agency's primary enforcement tool and will support later criminal investigations and prosecutions:

“• The Form I-9 audit process will be utilized in both criminal and administrative investigations to identify illegal workers, including criminal aliens employed at a business.

• Although auditors will assume primary responsibility for conducting Form I-9 audits, ICE special agents and auditors must coordinate closely because this process will often serve as an important step in the criminal investigation and prosecution of employers.”⁸

The agency's renewed emphasis on administrative employer's sanctions enforcement underscores the authors' efforts to provide American Bar Association member attorneys with this first book on the principles of immigration compliance auditing. Until now, attorneys have

⁷ Memorandum, Forman, Worksite Enforcement Strategy, ICE Director of Investigations (April 30, 2009). Found online on the author's website, <http://millerlawoffices.com/publications/Employers/Forman%20memo%20Best.pdf>.

⁸ *Id.*

relied on the amended Form I-9, the Handbook for Employers,⁹ as well as the regulations found in 8 C.F.R. § 274a for basic compliance information. Those sources are necessary references for I-9 verification information, and they have recently been augmented by ICE guidance as to the standards that the government employs in its own audit inspections. In May 2010, the ICE GUIDE TO ADMINISTRATIVE FORM I-9 INSPECTIONS AND CIVIL MONETARY PENALTIES¹⁰ was released. That agency field manual provides a national inspections blueprint to the agency's special agents and forensic auditors and is reproduced in its entirety in Appendix 7 of this book.

In another significant recent informational development, ICE officials confirmed that the agency continues to follow the IIRAIRA good faith paperwork violation defense policy set forth in the INS March 6, 1997 *Virtue Memorandum*.¹¹ The *Virtue Memorandum* is also published in its entirety, including its appendices A through H, in Appendix 3 of this book.

In IMMIGRATION COMPLIANCE AUDITING FOR ATTORNEYS, we provide external immigration compliance auditing principles, providing detailed guidance, including the following:

- A generally accepted terminology of professional requirements for audit engagements;
- The responsibilities and functions of an independent auditor as well as the corresponding compliance duties, responsibilities and functions of the employer;

⁹ USCIS, M-274 Handbook for Employers (April 3, 2009)(hereinafter Handbook for Employers).

¹⁰ Hereinafter ICE 2008 Guide (November 25, 2008), Appendix 7.

¹¹ Memorandum, Virtue, "Interim Guidelines: Section 274a(6) of the Immigration and Nationality Act, added by Section 411 of the illegal Immigration Reform & Immigrant Responsibility Act of 1996," Acting INS Executive Commissioner Programs, HQIRT 50/5.12 (Mar. 6, 1997), Appendix 3, hereinafter *Virtue Memorandum*.

¹¹ 8 C.F.R. §274a.9(f).

- Principles for field work audits, attorney auditor communications with clients, treatment of previous audits, independence, supervision, evidence gathering, audit assessments, findings and reporting, and
- Guidance on internal controls, fraud and illegal acts, materiality and the reporting of confidential and sensitive information.

It is our wish that IMMIGRATION COMPLIANCE AUDITING FOR ATTORNEYS leads to wider understanding of the employer and attorney auditor roles in compliance auditing. If this American Bar Association publication results in effective nationwide employer compliance with federal law, the authors will have achieved our desired objective.

Chapter 1- Immigration Compliance Auditing

1.01 Immigration Compliance Auditing

The primary purpose of an external immigration compliance audit is for the attorney auditor to provide an independent assessment regarding the client's compliance under the Immigration and Nationality Act, Department of Homeland Security regulations and immigration-related employment laws. Employer compliance responsibilities began as legal requirements with the passage of IRCA in 1986. It is now clear that, from the reports concerning the latest ICE worksite enforcement actions, criminal cases, and the FAR E-Verify final rule for certain federal contractors and subcontractors, that the legal responsibilities of employers under both the civil and criminal law have been enhanced.

External immigration compliance audits were originally developed as a condition of civil or criminal consent decrees and in corporate immigration due diligence engagements.

Immigration due diligence procedures are used for successor in-interest corporate situations to determine whether a company's immigration compliance program, policies and training meet statutory and regulatory requirements. Immigration compliance auditing is also a significant

factor in the mitigation of federal penalties involving the knowing hire or continuing employment of unauthorized workers.¹² New auditing responsibilities have also been voluntarily assumed by some employers because of Securities and Exchange Commission reporting requirements. Government contractors and certain subcontractors required to join the E-Verify program under the FAR Final Rule necessarily agree to periodic visits by the DHS or SSA, their authorized agents or designees.

Enhanced voluntary compliance responsibilities have also been assumed by employers who have chosen to enroll in the ICE IMAGE program.¹³ The IMAGE program requires that its member employers submit to an ICE audit, conduct a private external or independent internal audit, use the E-Verify program for all new hires, submit a self-assessment report, and adhere to the IMAGE program's Best Employment Practices.

1.02 The Immigration Compliance Audit - An Overview

The private external compliance audit contains the **Form I-9 Audit** (Chapter 5), the **Compliance Program Audit** (Chapter 6) the **Liability Audit** (Chapter 7) and **Anti-discrimination and Unfair Immigration-Related Employment and Practices Auditing** (Chapter 8).

The **Form I-9 audit** requires external attorney auditors to determine whether the retained I-9s contain substantive versus technical and procedural errors. The Form I-9 audit also requires the auditor to cross-check the I-9 forms against payroll records and related employment records to make an assessment of missing or questionable I-9 forms. Auditors will recommend remediation plans for I-9 errors to maintain the employer's good-faith affirmative defense against

¹² United States Sentencing Commission Guidelines Manual, Supp. to App. C at 103-105 (Nov. 1, 2007).

¹³ Beginning in 2006, the DHS encouraged employers in industries that traditionally utilize immigrant labor to voluntarily join the IMAGE program. IMAGE certified employers provide ICE with information concerning newly-hired employees in exchange for agency cooperation and resources.

knowingly hired charges.¹⁴ The attorney auditor will also make specific recommendations for the employer to correct deficient I-9s, including instructions as to the conduct of tardy verifications for missing I-9s, as well as supervision over the employer's remediation efforts.

The second component is the **Compliance Program Audit** in which the employer's existing compliance program is audited both for the substance of its policies and how those policies are implemented into compliance program procedures. Written compliance manuals and training programs are reviewed by the auditor to determine whether the company's IRCA Form I-9 verification and retention, anti-discrimination, contractor liability, and FAR (E-Verify) government contractor policies are compliant and up-to-date. The employer's immigration law compliance policy manual should provide its human resources employees with clear guidance on the various procedural requirements and record-keeping provisions, including H-1B posting, benching and public access requirements.

The company's immigration compliance training program for executives, managers and hiring agents is evaluated for its effectiveness. The employer's recruitment, hiring and termination policies and training must be evaluated for their compliance to the antidiscrimination and unfair immigration-related employment practices laws.

During the **Liability Audit**, the attorney auditors determine whether the employer has potential civil or criminal liability, liability for violations of the prohibitions against knowingly hiring or continuing to employ unauthorized aliens, Form I-9 paperwork and retention file violations. The ICE I-9 inspection, by comparison, requires that the agency provide a 10-day IIRAIRA notice to allow the employer to correct technical and procedural non-substantive I-9 errors before charging them with paperwork violations on a notice of intent to fine (NIF). The

¹⁴ INA § 274A(a)(3), 8 U.S.C. § 1324a(a)(3).

private external liability audit, however, focuses on complete audit remediation, including the correction of both substantive and technical I-9 deficiencies in order to begin the running of the statute of limitations to avoid administrative liability and mitigate potential penalties.¹⁵ This audit also includes an assessment of the employer's potential liability, including civil or criminal penalties, for violations of the following laws:

- H-1B LCA dependency status¹⁶ and public access requirements¹⁷;
- Permanent labor certification retention rules¹⁸;
- FAR E-Verify rules for certain government contractors and subcontractors¹⁹;
- Sanction violations involving constructive knowledge including contractor and subcontractor knowledge liability²⁰;
- Past and current government enforcement actions and notices;
- The employer's potential exposure for government worksite enforcement actions; and
- Pending or potential anti-discrimination or unfair immigration-related employment laws.

Anti-discrimination (AD) and Unfair Immigration-Related Employment and Practices (UIREP) auditing requires the auditor's determination as to whether the employer's compliance policies and procedures, compliance manuals, and compliance training programs comply with

¹⁵ 28 U.S.C. § 2462; *Curran Engineering Company, Inc.*, 7 OCAHO 975 (Oct. 31, 1997).

¹⁶ 20 C.F.R. § 655.760(a)(8).

¹⁷ 20 C.F.R. § 655.760.

¹⁸ 20 C.F.R. § 656.10(f).

¹⁹ President Bush issued an executive order on June 6, 2008 requiring all federal contractors to use the E-Verify electronic verification system to ensure that their workforce is composed of legal U.S. workers. To further implementation of the Executive Order, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) published a regulation which amended the Federal Acquisition Regulation (FAR) to require government contractors and subcontractors to join E-Verify. 73 Fed. Reg. 67651 (Nov. 14, 2008), amending the Federal Acquisition Regulation (FAR) at 48 C.F.R. Parts 2, 22, and 52. DOD, GSA and NASA published amendments postponing implementation of the FAR E-Verify final rule to allow the Obama administration's review of the final rule's legal basis. 74 Fed. Reg. 5621 (Jan. 30, 2009); 74 Fed. Reg. 17793 (Apr. 17, 2009). Implementation began on September 8, 2009. 74 Fed. Reg. 26981 (June 5, 2009).

²⁰ 8 C.F.R. § 274a.1(l)(i).

the statutes, agency regulations and written policies. The auditor must review and make the determination as to whether the employer's hiring, employment and promotion practices have been in compliance with laws and agency policies regarding AD and UIREP.

1.03 Immigration Compliance Auditing Principles – An Overview

At the outset, prior to the engagement, there must be candor with regard to considerations about whether the auditor's experience, training, knowledge, skills and abilities are sufficient to assess the risks so that the audit avoids inaccuracies and misinterpretation. Minimum competency qualifications are necessary because the auditing attorney must exercise professional judgment in determining the sufficiency and appropriateness of evidence to be used to support the findings and conclusions based on the audit objectives. Attorney auditors are required to document significant decisions affecting the audit objectives, scope, and methodology, findings, conclusions and recommendations resulting from professional judgment.

The principles described in this book contemplate that auditors will establish an understanding with the client regarding the services to be performed for each engagement. Auditors should provide to the client a full written description of the services to be performed and the audit objectives for each engagement. This book's principles stress the need for auditor independence with respect to the entity being audited. To be independent, the auditor must be unbiased, as well as intellectually honest and free of any obligation or interest in the client's business, management or ownership.

An immigration compliance audit performed using these principles provides reasonable assurance that the auditors have obtained sufficient, appropriate evidence to support the conclusions reached and have considered audit risk, the use of the previous work of others,

assignment of staff and resources, evidence and its assessment and the proper development of findings and documentation.

The auditor's report should present sufficient, appropriate evidence to support the findings and conclusions according to the audit objectives along with recommendations for corrective action. Auditors should disclose in the report when confidential or sensitive information has been omitted and the reason or other circumstances that makes the omission necessary. Audit reports communicate the results of audits, make the results less susceptible to misunderstanding and facilitate appropriate corrective actions. The audit report should also include a description of the methodology of the report explaining how the completed audit supports the audit objectives.

This book's principles encourage auditors to plan and perform the audit to obtain reasonable assurance that the applicable records are free of material misstatement, whether caused by error, fraud or illegal acts.

Audit documentation should be prepared in sufficient detail to enable a subsequent auditor to understand from the documentation the nature, timing, extent, and results of procedures performed, the evidence obtained, its source and the conclusions reached.

Compliance audit engagements conducted according to this book's principles will include clearly defined objectives, scope, methodology and evidence to support significant judgments and conclusions.

1.05 External Immigration Compliance Audits

1.05.1 The Components of the Immigration Compliance Audit

1.05.2 The Form I-9 Audit

I-9 external audits determine whether an employer's Form I-9 verification compliance

meets statutory and regulatory requirements.²¹ An important feature of the external I-9 audit is remediation recommendations for the I-9 compliance program, the discovery and cure of specific potential violations as well as mitigation for potential violations to minimize liability for penalties. While the IIRAIRA cure of technical and procedural paperwork deficiencies upon a 10- day agency notice is an important statutory defense during agency inspections, the private corrective efforts of an employer, in advance of agency investigation, is an indicia of the availability of the general statutory good faith defense²² recognized by OCAHO decisions, and will be considered by the administrative law judge in both the liability and penalty phases of the administrative hearing process.

For these purposes, the I-9 audits require the auditor to make determinations as to the running of the statute of limitations for paperwork violations (from the correction of the I-9's²³), timeliness violations (from the second²⁴ and fourth day of employment²⁵) and knowingly hiring or continuing to employ violations²⁶ (from the termination of the employee). Currently, attorney auditor certification of I-9 audits may be necessary for Sarbanes-Oxley²⁷ required disclosure, as a condition of civil or criminal settlements and as a condition of ICE IMAGE membership. Those certifications may require that an entire population of the employer's I-9s be audited according to the principles discussed in this book.

Other objectives may allow the auditor's engagement to be limited by the agreement between the auditor and the client, including due diligence for reorganizations including mergers

²¹ Chapter 5.

²² INA § 274A(a)(3), 8 U.S.C. § 1324a(a)(3).

²³ 8 C.F.R. § 274a.2(b).

²⁴ 8 C.F.R. § 274a.2(b)(1)(i)(A).

²⁵ 8 C.F.R. § 274a.2(b)(1)(ii)(B).

²⁶ INA § 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A); INA § 274A(a)(2), 8 U.S.C. § 1324a(a)(2).

²⁷ Sarbanes-Oxley Act of 2002, PL 107-204, 116 Stat 745, Codified in Sections 11, 15, 18, 28, and 29 USC (July 30, 2002). *Hereinafter* Sarbanes-Oxley.

and acquisitions, or as a result of contract conditions with a vendee. Nevertheless, the auditing principles for external I-9 auditing require that the auditor determine whether the employer is in compliance with the Immigration and Nationality Act, as amended, and the Department of Homeland Security's I-9 verification and re-verification regulations. By necessity, the auditor's reliance on a past I-9 audit conducted by another auditor will, in large measure, be determined by whether the previous auditor followed the generally accepted principles discussed in this book, including the following determinations:

- That the employer's I-9 verification program meets statutory and regulatory requirements;
- Whether the retained I-9s contain substantive versus technical and procedural errors;
- Whether the retained I-9s reflect that proper re-verification has been conducted for employment authorization documents that expire;
- Whether the employment records reflect employees for which there are missing I-9s;
- The existence of the evidence of actual and/or constructive knowledge of the hiring or the continued employment of unauthorized employees including contractor or subcontractor hiring or employment violations;
- The existence of the evidence of actual and/or constructive knowledge of the hiring or the continued employment of unauthorized workers by contractors, subcontractors or outsourcing companies;
- Recommendations as to mitigation for potential violations and best compliance practices and follow-up as to timely and proper employer mitigation;

- Auditor remediation recommendations and follow-up as to timely and proper employer corrections;
- The efficiency of the employer's system, if any, for the re-verification of I-9s;
- Whether there is substantial evidence of the employer's good faith compliance with the verification requirements that would allow the employer to assert a statutory affirmative defense to the knowingly hiring charge under INA § 274A(a)(3), 8 U.S.C. § 1324a(a)(3).

The auditor must determine if the employer's verification efforts as evidenced by the Forms I-9, and any supporting documentation, comply with the INS or DHS chronological regulations, policy and forms appropriate for the date of the required verification or re-verification. The auditor must also consider whether additional objectives should be included in the I-9 external audit, including ICE IMAGE program membership compliance, FAR government contractor or subcontractor compliance, electronic I-9 retention, compliance with state immigration-related employment laws and conformance with the conditions of past enforcement and/or judicial orders or agreements.

The auditing engagement will be further defined by whether the employer is subject to the requirement of public company disclosure of potential I-9 enforcement liability on a financial statement under Sarbanes-Oxley.

An initial part of the I-9 audit is a risk assessment plan that provides reasonable assurances that the auditor will effectively evaluate evidence that indicates the existence of fraud, illegal acts or violations of the immigration-related provisions of contracts, and ethically reports that evidence.

1.05.3 The Compliance Program Audit

Compliance program audits determine whether the employer's compliance policies and procedures, compliance manuals, and compliance training programs comply with the applicable statutes, agency regulations and policies. The compliance program audit will provide objective analysis so that the client can use the information for program improvement and, when necessary, to initiate corrective action.²⁸

The auditor should determine whether additional objectives should be included in the compliance program audit, including the following conditions:

- a. If the employer is a participant in the ICE IMAGE program;
- b. If the employer is a member of the E-Verify program or if the employer is a government contractor or an identified subcontractor required to join E-Verify under the FAR E-Verify regulation;
- c. If the employer is or has been the subject of government I-9 inspections;
- d. If employer is subject to the requirement of public company disclosure of potential compliance liability on a financial statement under Sarbanes-Oxley;
- e. If the employer is subject to auditor certification of its compliance program including policies, compliance manuals and training programs as a condition of a civil or criminal settlement or a deferred prosecution agreement or non-prosecution agreement;
- f. Due diligence in a merger or acquisition or other successor-in-interest situation;
- g. The compliance program audit is conducted as a condition of a contract or subcontract with another entity regarding compliance program auditing requirements for contractors and subcontractors.

²⁸ Chapter 6.

1.05.4 The Liability Audit

Liability auditing assesses civil and criminal penalty liability for violations of statutes and agency regulations as well as liability under anti-discrimination and unfair immigration-related employment and practices laws. During liability auditing, the auditor will determine if favorable or adverse factors will affect the potential mitigation of penalties and whether the statute of limitations has run on past failures.²⁹

1.05.5 Anti-discrimination and UIREP Auditing

Auditing for Anti-discrimination (AD) and Unfair Immigration-Related Employment Practices (UIREP) issues requires a determination as to whether the employer's compliance policies and procedures, compliance manuals, and compliance training programs comply with the statutes, agency regulations and written policies.³⁰ The auditor reviews the employer's compliance programs, policies and procedures, manuals, and training programs and reports determinations as to whether the employer is in compliance with laws and agency policies regarding AD and UIREP. The audit report provides objective analysis for the client so that the information can be used for program improvement, including compliance with statutory or regulatory compliance measures and the initiation of recommended corrective action. The liability audit report must include a determination of the employer's potential liability regarding pending or potential AD and UIREP violations. The auditor's analysis of the penalty provisions of Act's AD, UIREP provisions, document abuse provisions, and other laws such as Title VII of the Civil Rights Act of 1964 will include a determination as to the range of possible penalties concerning instances of violations. The auditor's remediation recommendations should include

²⁹ Chapter 7.

³⁰ Chapter 8.