# Morgan Lewis

Knock, Knock, the Government Is
At Your Door:
Surviving Immigration Related Audits
and Investigations



### Agenda

- ICE Enforcement
- H-1B Site Visits
- Consular Investigations
- Department of Labor (DOL) Enforcement
- Managing Global Personnel

#### I-9 Enforcement

#### **ICE** Activity

- Waves of I-9 inspections
- ICE Employment Compliance Inspection Center (ECIC)
- "Paper Raids"
- Criminal prosecution of egregious behavior
- Employers of all sizes

#### **How to Prepare**

- Self-audit by counsel or trained personnel
- Training of I-9 personnel
- Policies and protocols for
  - Completion
  - Retention
  - Reverification

#### **I-9 Sanctions**

#### **ICE** Activities

- Civil fines for most violations
- Press releases to shame employers and scare them straight
- Most are negotiated resolutions involving legal defenses

#### **Meaning for Employers**

- Financial exposure
- Brand exposure
- Shareholder liability exposure
- Enhanced fines for repeat violations
- Potential labor continuity issues

#### Self-Audits

#### **Employers Should**

- Carefully craft all communications
- Treat all employees the same
- Clearly understand what types of corrections are permissible and how to make them
- Be aware of potential union issues, if applicable

#### **Employers Should Not**

- Request or require specific documents
- Treat certain classes of employees differently
- Perform a self-audit without first receiving outside training
- Take adverse action against employees without benefit of counsel

## E-Verify

#### **Federal**

- Status of proposed mandatory E-Verify legislation
- OSC enforcement of misuse

#### State and Local

- Mandatory
  - Alabama
  - Arizona
  - Georgia
  - Mississippi
  - North Carolina
- Other state laws
- Latest from California

## Major Changes with IMAGE

#### **Employers must:**

- Use E-Verify companywide
- Submit to an ICE I-9 review
- Implement best practices and policies

#### ICE will:

- Provide "ample time" to correct technical violations
- Not issue sanctions if substantive violations are found in fewer than 50% of I-9 forms
- Sanction at statutory minimum if < 50% have substantive deficiencies

#### H-1B Site Visits

- Administrative Site Visit & Verification Program (ASVVP) By far the most common form of immigration-related government intrusion (14,433 site visits in 2010, more in 2011)
- Conducted by USCIS Office of Fraud Detection and National Security (FDNS)—not an enforcement agency
- Purpose is to assess accuracy of information contained in approved H-1B petitions
- Site visits are conducted on a random basis
- Visits are "beneficiary-centric": particular industries and employers are not targeted
- May receive a site visit if you have an H-1B contractor/consultant working on-site
- Funded by a \$500 petition fraud fee

### What Happens During an FDNS Site Visit?

- The FDNS contractor:
  - Will arrive at the worksite identified in Form I-129
  - Will be unannounced, alone, not in uniform, and unarmed
  - Will ask to speak to person who signed the Form I-129
  - Will ask a series of questions from a script
  - Will ask to speak to H-1B beneficiary
  - May ask for payroll records
  - May take photographs of worksite
  - Will leave without saying anything—will not inform you of outcome of visit
- Most visits take less than an hour

#### What Questions Are Asked?

- Of the **petitioner**: number of employees, number of H-1B employees, and information in petition
- Of the beneficiary: name; DOB; address (may ask for driver's license); phone #; all worksite addresses; exact dates of employment at each worksite location, as applicable; work hours; salary; date employment started; job title, duties, and responsibilities; amount of vacation and sick time; and name, title, and contact information of supervisor
- If the beneficiary is a **contractor** working at a client site: name, address, and phone number of end client; changes to the itinerary provided in the petition; number of the petitioner's employees are working at the same worksite as the beneficiary; training provided by the petitioner to the beneficiary; product or service provided by the petitioner providing to the end client; tools, instrumentalities, products, services, or information unique to the petitioner used by the beneficiary; whether services of the beneficiary are part of a staff augmentation plan; name and employer of the individual who orders, directs, and controls the day-to-day activities and the manner and means of performing the work performed by the beneficiary; name, employer, and phone number of the individual who supervises the work performed by the beneficiary at the client worksite; and the periodic progress/performance reviews received by the beneficiary

© Morgan, Lewis & Bockius LLP

Morgan Lewis

#### How Should You Handle a Site Visit?

- Make sure all of the information in your H-1B petitions is accurate and up to date
- Designate someone in-house to handle site visits
- Make sure your H-1B employees are aware of the possibility of a site visit
- Do not insist on a warrant or subpoena or on attorney presence (but can have attorney on phone)
- Do ask for ID and a business card
- Be cooperative and professional, but observe company security rules (do not allow access to secure areas)
- Tell the contractor if you do not know the answer to a question
- NEVER allow an employee to be interviewed alone
- Develop a company protocol for handling site visits

### What Happens After a Site Visit?

- No news is good news (86% of petitions are "verified" after site visit)
- The contractor may show up again unannounced, but will not reschedule visit
- May receive an email message from the contractor if he/she was not able to conduct a visit (particularly if there is a work location issue)—Will ask for:
  - Address where the beneficiary is working
  - Information regarding "episodic" nature of work
  - Certified Labor Condition Application covering worksite
  - Beneficiary's W-2
  - Payroll records
  - Current paystubs
- If there is a problem, may receive a further visit from an FDNS officer (1% of total in 2010)
- May also receive written Notice of Intent to Revoke H-1B Petition (7% of total in 2010)

# Department of State Investigations and Consular Delays

- Delays due to consular investigations of both employer and employee growing alarmingly frequent
- "Administrative processing" is catch-all phrase used for all types of additional investigatory actions by DOS
- National Security Clearances
  - Condor (Terrorism) 3-6 weeks
  - Mantis (Technology Alert List) 6-8 weeks
  - Donkey (Noncriminal name "hit") 2-3 months
  - NCIC (Criminal Database "hit") approx. 1 day

#### NY CLE CODE

Below is the CLE code for the state of New York. This codes is ONLY for New York CLE – all other CLE will be processed automatically.

# KKG181011

Please write this code down. After the webcast, you will receive a form from Morgan Lewis that you will need to submit, with that special code, in order to confirm your attendance and receive credit.

# Department of State Investigations and Consular Delays

- "Pink Letters" common at U.S. consular posts, especially in India; burdensome requests regarding employer viability and employer-employee relationship
- FPUs at consulates readjudicating petitions and sending record numbers back to USCIS for possible revocation
- Ensure that employee notifies you when planning to depart the United States, for visa issuance
- Make contingency plans for visa delays
- Limited amount attorneys can do to help (LegalNet inquiry after 60 days)

# DOL Enforcement of H-1B and PERM Compliance

- Memorandum of Understanding from March 2011
  - Between DHS and DOL
  - Goal is to enforce labor and immigration laws relating to the worksite
  - Stated purpose to make sure there are proper wages and working conditions for all covered workers regardless of their immigration status
  - Key government enforcers ICE, Wage and Hour Division,
     Office of Federal Contract Compliance Programs, and
     OSHA

# DOL Enforcement of H-1B and PERM Compliance

- Are employers complying with their wage obligations?
  - Prevailing Wage Considerations
    - H-1B are employers paying the proper wages?
    - Is there documentation showing how the wages are calculated?
    - Are your documents in order?
- What are the employer's obligations?
  - No benching
  - No reductions below the required wage

# DOL Enforcement of H-1B and PERM Compliance

- Willful Violator dependent employer obligations
- PERM audits
  - Supervised Recruitment
- Debarment

### Strategies for Managing Global Personnel

- Many foreign countries have stringent rules limiting the activities of business visitors
- Keep in mind that there are also sanctions in many countries for unauthorized work—for both employer and employee
- Ensure you have obtained adequate information regarding the correct visa classification for any individual assigned or traveling abroad

#### **Presenter Contact Information**



Eric Bord
Washington, D.C.
202.739.6040
ebord@morganlewis.com



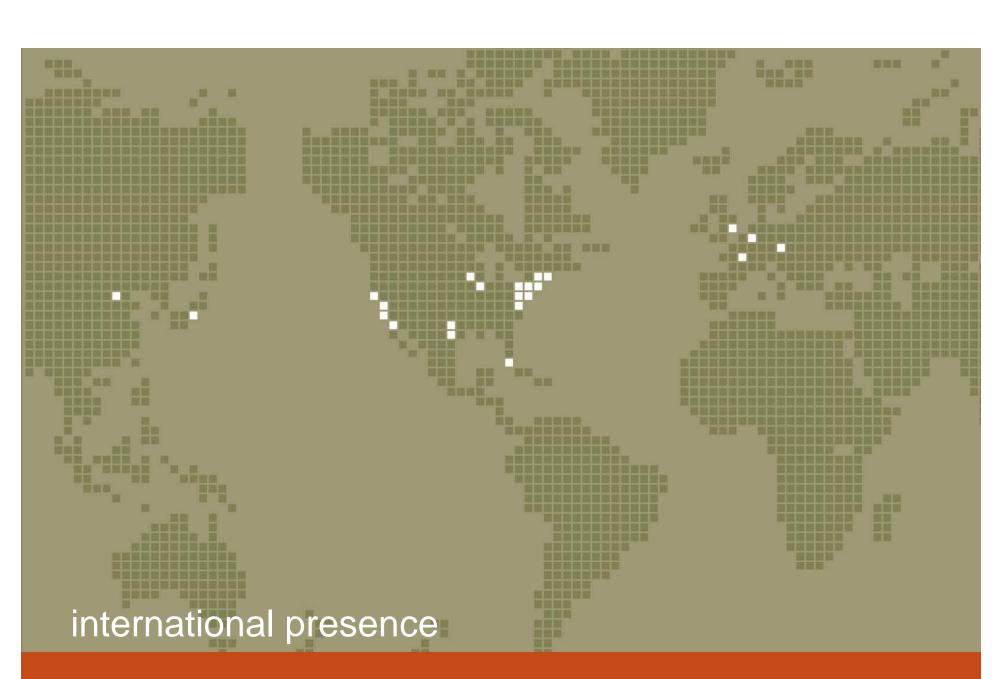
Eleanor Pelta
Washington, D.C.
202.739.5050
epelta@morganlewis.com



Lisa Stephanian Burton
Boston
617.341.7725
Iburton@morganlewis.com



A. James Vázquez-Azpiri San Francisco 415.442.1343 ajvazquez@morganlewis.com



Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine London Los Angeles Miami New York Palo Alto Paris Philadelphia Pittsburgh Princeton San Francisco Tokyo Washington Wilmington