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Preparing for ICE Workplace Investigations: Complying With Increased I-9 Enforcement

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Preparing for ICE Workplace Investigations

November 13, 2018

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1. BACKGROUND

On November 6, 1986, the enactment of the Immigration Reform and Control Act (IRCA) required employers to verify the identity and employment eligibility of their employees and created criminal and civil sanctions for employment related violations. The purpose of this law was to prevent individuals who are not eligible to work in the U.S. from performing work. Section 274A (b) of the Immigration and Nationality Act (INA), codified in 8 U.S.C. § 1324a (b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986. 8 C.F.R. § 274a.2 designates the Employment Eligibility Verification Form I-9 (Form I-9, or simply I-9) as the means of documenting this verification. Employers are required by law to maintain for inspection original Forms I-9 for all current employees. Forms I-9 are required to be retained for former employees for a period of at least three years from the date of hire or for one year after the employee is no longer employed, whichever is longer.

The I-9 must be completed for each employee within three days of beginning employment. If this cannot be done within this time limit, the employee must be put on a leave of absence or terminated, per company policy. All similarly-situated individuals should be treated the same in this regard.

U.S. citizens and lawful permanent residents will have permanent work authorization in the U.S. Foreign workers whose work authorization is temporary must indicate the expiration date under Section 1 of the I-9, and the employer must reverify the employee's eligibility to continue working in the U.S. on or before that expiration date by either completing Section 3 of the I-9 or by completing a new I-9. If this process is not completed by the expiration date, the employee cannot continue to work; the employee must be put on a leave of absence or terminated.

If the employee changes names in conjunction with an extended employment authorization, the name change on new work authorization documents must be recorded during the reverification process. If the employee changes names for personal reasons, e.g., marriage, this change is not required to be captured by updating an I-9, although it is allowed.

Thus, for many years under federal law, employers have been required to verify the identity and employment eligibility of all individuals they hire, and to document that information using the I-9.

Federal contractors that are subject to the Federal Acquisition Regulation (FAR) E-Verify clause and that choose to verify existing employees by updating existing I-9s have special rules regarding when they must complete new I-9s. Under this option, a new I-9 must be completed when an employee changes his or her name. The E-Verify Supplemental Guide for Federal Contractors, available on the USCIS website has additional information for these federal contractors.

U.S. Immigration and Customs Enforcement (ICE) is the federal agency responsible for upholding the laws established by IRCA.

2. ICE Workplace Enforcement Priorities

In a press release issued January 10, 2018, ICE outlined a 3-prong approach to workplace enforcement compliance.

The three prongs of its workplace enforcement compliance are:

- I-9 inspections, civil fines and referrals for debarment;
- enforcement through the criminal arrest of employers who knowingly employ undocumented workers, and the administrative arrest of unauthorized workers for violation of laws associated with working without authorization; and
- outreach, through the ICE Mutual Agreement between Government and Employers, or IMAGE program, to instill a culture of compliance and accountability. Under the IMAGE program, ICE certifies organizations for complying with the law. As part of this program, ICE and U.S. Citizenship and Immigration Services provide education and training on proper hiring procedures, fraudulent document detection, and the use of the E-Verify employment eligibility verification system.

According to this press release, ICE's worksite enforcement strategy focuses on the criminal prosecution of employers who knowingly hire illegal workers. ICE also uses I-9 audits and civil fines to encourage compliance with the law.

In July 2018, ICE announced the results of a two-phase nationwide operation in which I-9 audit notices were served to more than 2,500 employers around the country since January 2018. From January 29 to March 30, the first phase of the operation, ICE served 2,540 audit notices and made 61 arrests. From July 16 to 20, 2018, the second phase of the operation, ICE served 2,738 audit notices and made 32 arrests.

Soon, ICE intends to conduct up to 15,000 Form I-9 audits per year, to be completed by electronically scanning documents in a not-yet-created national inspection center.

3. Why Has ICE Increased Its Enforcement Efforts?

On January 25, 2017, President Trump issued an Executive Order entitled "Enhancing Public Safety in the Interior of the United States." Among other things, it defined as a priority (regardless of the basis of removability of any individual) any non-U.S. citizen who:

- has been convicted of any criminal offense;
- has been charged with any criminal offense, when the charge has not yet been resolved;
- has committed acts that constitute a chargeable criminal offense;
- has engaged in fraud or willful misrepresentation in connection with any official matter or application before a government agency;
- has abused any program related to the receipt of public benefits;

- is subject to a final order of removal, but has not departed; or
- otherwise poses, in the judgment of an immigration officer, a risk to public safety or national security.

This represented a significant departure from the policies that had been in place during the Obama administration.

Shortly thereafter, on February 20, 2017, the Department of Homeland Security (DHS) issued a memo entitled "Enforcement of the Immigration Laws to Serve the National Interest." This memo, among other things, stated that prosecutorial discretion "shall not" be exercised in a manner that exempts or excludes a specified class or category of noncitizens from enforcement of the immigration laws. It also prioritized for removal those aliens described in the Immigration and Nationality Act, sections

212(a)(2), [1]
212(a)(3),[2]
212(a)(6)(C),[3]

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[1] This section is very lengthy and detailed. As a broad generalization, it describes aliens who (A) were convicted of or admitted to certain crimes involving moral turpitude or an attempt or conspiracy to commit such a crime, or to a violation or conspiracy to violate any federal or state law or regulation or a law or regulation of a foreign country relating to a controlled substance; (B) were convicted of 2 or more offenses, regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement 2 were 5 years or more is inadmissible; (C) who is reasonably believed to have been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or is the spouse, son, or daughter of such an alien and who has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity; (D) who is coming to the United States to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status, or who has attempted to procure or procured prostitutes for the purpose of prostitution or to engage in any other unlawful commercialized vice, whether or not related to prostitution; (E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution; (F) [deals with waivers of certain provisions]; (G) foreign government officials who have committed particularly severe violations of religious freedom; (H) significant traffickers in persons; (I) money laundering.

[2] This section is very lengthy and detailed. In general, it addresses security and related grounds such as (A) any alien who is suspected or known to try to enter the U.S. to engage in any activity that violates U.S. laws relating to espionage or sabotage or to violate or evade any law prohibiting the export from the U.S. of goods, technology, or sensitive information, any other unlawful activity, or any activity a purpose of which is the opposition to, or the control or overthrow of, the U.S. government by force, violence, or other unlawful means; (B) has engaged or is reasonably believed to be likely to engage in terrorist activity, as defined.

[3] This section addresses any alien who fraudulently or willfully misrepresents a material fact to obtain a visa, other documentation, or admission into the United States or other benefit provided under this Act, or who falsely claims U.S. citizenship (except an alien making such a representation where each of his/her natural or adoptive parents is or was a U.S. citizen, the alien permanently resided in the U.S. prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he/she was a citizen).

235(b),[4]
235(c),[5]
237(a)(2)[6] and
237(a)(4).[7]

The impact of this change in enforcement has had immediate and dramatic effects. From January 25, 2017 through September 30, 2017, ICE arrested 110,568 individuals. This is a 42% increase over the same period in 2016, during which 77,806 individuals were arrested. ICE stated that 92% of the arrests were individuals who either had criminal convictions or who had criminal charges pending final disposition. However, the ICE statistics do not differentiate between arrests of individuals who have been convicted of a crime and those who have been charged but are awaiting final resolution of their case. In any case, this means that approximately 8% of the arrests were individuals who had neither criminal convictions nor pending criminal charges.

From Oct. 1, 2017, through May 4, 2018, ICE opened 3,510 worksite investigations; initiated 2,282 I-9 audits; and made 594 criminal and 610 administrative worksite-related arrests,

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[4] This section addresses inspection of applicants for admission including procedural and substantive provisions relating to claims for asylum, or a fear of persecution, including provisions for certain situations such as an alien who is a native or citizen of a country in the Western Hemisphere with whose government the U.S. does not have full diplomatic relations and who arrives by aircraft at a port of entry; certain aliens from the Commonwealth of the Northern Mariana Islands, certain crewmen, and certain aliens who arrive on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States.

[5] This section addresses aliens who are inadmissible based on certain security and related grounds and who are removable without further hearing.

[6] This section is lengthy and detailed. In general, it addresses aliens (including an alien crewman) who has been convicted of certain crimes including certain crimes of moral turpitude, aggravated felony, crimes relating to high speed flight from an immigration checkpoint, failure to register as a sex offender; violations of U.S., state or foreign laws relating to controlled substances (other than a single offense involving possession for one's own use of 30 grams or less of marijuana); who is or has been a drug abuser or addict; who has been convicted of purchasing, selling, using, possessing ,or carrying a firearm or destructive device in violation of any law; certain crimes relating to espionage, sabotage, treason or sedition; a violation of any provision of the Military Selective Service Act or the Trading With the Enemy Act; a violation of section **215** or **278** of this Act; certain crimes of domestic violence; or trafficking.

[7] This section is also very lengthy and detailed. In general, it addresses security and related grounds such as aliens (A) who have violated U.S. law relating to espionage, sabotage, or laws prohibiting the export of goods, technology or sensitive information, any other criminal activity which endangers public safety or national security, or activities for the purpose of opposing or overthrowing the U.S. government by force, violence or other unlawful means; (B) who have engaged in terrorist activities; (C) whose presence or activities in the U.S. are reasonably believed to have potentially serious adverse foreign policy consequences for the U.S.; (D) who participated in Nazi persecution, genocide, or any act or torture or extrajudicial killing; (E) who committed severe violations of religious freedom; (F) who recruited or used child soldiers in violation of U.S. law.

Regardless of whether one agrees or disagrees with the Trump administration's policies or approach to immigration, it has and will continue to have an impact on employers – regardless of the employer's own opinion of the approach.

4. ICE Workplace Raids

One tactic used by ICE is the workplace raid, which is also called targeted enforcement operations. An ICE raid is what is sounds like: Homeland Security Investigations (part of ICE) shows up at the employer's workplace without warning, in the hopes of catching the employer and employees by surprise. Raids often happen after an ongoing investigation suggests a number of undocumented workers are employed there, often without the employer's knowledge or assistance.

There is no advance notice to the employer of a raid. Before the raid, ICE has likely conducted a lengthy investigation, including following up on tips or other information that lead it to believe a raid could be productive. ICE agents will have surveyed the worksite, noting entrances and exits in order to know how to secure the premises. Sometimes they have gained access under false pretenses, such as asking for a tour of the company for what sounds like a legitimate reason.

There is no advance notice to the employer of a raid. ICE agents will arrive wearing uniforms that may say "police" or "federal agent." They may carry guns. Sometimes local police or sheriffs go with ICE agents on a raid.

When ICE arrives for a raid, its armed agents surround the building, often with aerial support, effectively sealing off all exists and escape routes. Agents enter the business with a criminal search warrant that has a detailed description of what and where agents are going to search and what they may seize. The supervising agent serves the search warrant on either the receptionist or other employer representative and alerts the other agents via radio transmitters that entry has been made, thus allowing their entry. An employer who is the subject of a raid should immediately contact its attorney and immigration legal counsel. The attorney should be asked to come to the employer if possible, and be there during the raid. However, the raid will not be postponed to wait for the attorney to arrive.

The ICE agents may demand that all machinery be shut down, that no one leaves the premises, and that employees be gathered into a contained area such as the employee break room for questioning. While some of the agents are questioning employees, others are going through drawers and file cabinets, seizing documents and computer-related equipment.

Since this is a criminal action, the criminal search warrant must be signed by a judge, not just an administrative warrant. Therefore, it is critical that the employer know the difference between an administrative "warrant" and a judicial, legally enforceable warrant. An enforceable, judicial warrant will be issued by a court and will have the name of the court at the top, together with a case number. The title of the document will be "Search and Seizure Warrant" or wording very similar to that. It will be dated and signed at the bottom by an identified judge. It will authorize a search to be conducted within a specific time period, during daylight hours, before a

specific date. It will also contain a description of the premises to be searched. If the search warrant authorizes ICE to seize documents, it will describe those items. The kinds of documents that can be identified can be quite long, including such things as employee identification documents, payroll records, I-9s, bank and payroll records, other financial records such as checks that may indicate the transfer of funds in furtherance of the employment of undocumented employees. It can also require the production of electronic records. The search warrant will also include an affidavit in support that describes the background and experience of the ICE agent who sought the search warrant and the evidence that supports the agent's belief that crimes have been committed.

In contrast, ICE sometimes tries to use an administrative "warrant." These are simply documents prepared by ICE and signed by an ICE agent. They are not legally enforceable. If the employer is not sure what kind of document ICE is presenting, the employer should immediately fax or email a copy to the employer's attorney.

The employer is not required to answer agents' questions during a raid. Similarly, an employee is not required to talk to ICE agents or answer their questions, and can ask for an attorney to be present. However, unlike other law enforcement officers, ICE agents are not required to advise an employee of "Miranda Rights." An employer is not required to allow ICE agents into the workplace or provide access to employees or employee documents during a raid unless there is a valid judicial warrant. No employee has an obligation to sign anything that an ICE agent presents during the raid.

Of course, ICE agents can enter a pubic area without a judicial warrant, just like any other member of the general public can. However, this does not give them unfettered rights to search or detail individuals, or even remain on the employer's premises. Individuals who are questioned in public have the right to remain silent and can (and should) calmly ask if they can leave. The employer can also ask IC agents who do not have a judicially enforceable warrant to leave the premises. In other words, without a judicial warrant, the ICE agents can be treated like any other member of the general public.

If ICE asks for a specific individual, the employer should not lie or try to hide the individual. If ICE has a valid arrest warrant, ask the individual to walk outside or to a public waiting area. The employer does not have to allow ICE agents to enter any provide areas or other areas where other workers are present. Like a valid search warrant, a valid arrest warrant must contain certain things in order to be legally enforceable, such as the time limitations on when it can be executed, a description of the individual, and a judge's signature. ICE agents sometimes try to use a non-judicial "arrest warrant" which is not enforceable, e.g., an order or removal (deportation). Neither an "ICE warrant" nor a removal order entitle ICE to enter or inspect the non-public areas of the workplace.

If ICE only has an administrative warrant with an employee's name on it, the employer does not have to say if that employee is working on that day or not, and does not have to take the ICE agents to the employee.

To the extent possible, everyone should remain calm. Running away, hiding, or similar actions usually make things worse. Not only can trying to escape result in accidents and injury, it can give the ICE agents a reason to arrest the person who is trying to escape, similar to the right of a police officer to arrest someone trying to flee the scene of a crime. Furthermore, those who try to help an employee escape or hide can be charged with obstruction of justice.

Sometimes employees do not have their immigration documents with them. Human Resource personnel can retrieve copies of the documents from the I-9 file (if copies were made), or a family member can be contacted and asked to bring the original documents to the employer.

Not only do ICE agents question employees, but they typically attempt to question employer representatives about its immigration policies and practices. Anything that is said can and will be used against the employer.

If ICE discovers unauthorized workers at the site during a raid, it can arrest and detain them. At the end of the raid, the ICE agents should leave an inventory of the property they seized and a list of employees arrested.

Employers are wise to think about and plan for an ICE raid in advance. Things to consider include:

- Identify "public" and "private" areas of the workplace and educate employees about the difference. It can be helpful to visually indicate where the public area ends through signage and/or doors. Make it clear to employees what "public area" means, since there may be different levels of access. For example, while a waiting room may be open to the general public, it could also be restricted to customers and persons accompanying them. Having a written policy that explains this and disseminating it to employees can be very helpful in this regard. Key employees should also be designated to interpret and enforce the policy as needed.

- Consider educating employees about their rights, such as through posters or other educational materials. This could include the right to remain silent and ask that a lawyer be present if they are going to be questioned. Employees should be told to treat ICE agents respectfully, however. Employees should not yell at them or try to block their way.

- The point of first contact, typically the receptionist and anyone who covers this position during absences, breaks, etc., should receive special training on how to interact with ICE agents. This individual should also know how to contact the employer's attorney and be instructed to do so immediately without waiting for further instructions. It is a good idea to role play, since the situation can be very tense and stressful when it really occurs.

- If ICE agents ask permission or try to enter a private area, the designated individual should clearly state that he/she does not consent to entry without a warrant. If the agents say they have a warrant, the designated person should be ready to review it and/or immediately get the warrant to the employer's attorney for review and advice. If the ICE agents say they are planning to get a warrant, it's a tip that they don't currently have one; the employer's attorney should be contacted and if possible be present during any subsequent search.

- The designated individual should be trained to examine warrants to ensure that they (a) are a valid, judicially issued warrant signed by a judge, (b) are being served within the permitted time frame, and (c) understand the scope of the warrant (e.g., what area can be searched, what items or persons can be seized).

- Assign one or two employer representatives to each agent to follow them around the facility. The witnesses should record on a note pad all actions and/or videotape the agents. Note an items seized and ask if copies can be made before they are taken. While ICE doesn't have to agree to allow copies to be made, if they don't allow copies to be made the employer has the right to obtain a copy from the government property lockers.

- Sometimes a member of the press is there with the ICE agents. There is no obligation to admit a member of the press onto the premises. Only the employer's attorney should be allowed to make any statements to the press.

- Remain calm and do not engage in hostilities towards the ICE agents or police.

- If the ICE agent asks to go into a private area, the designated employee should be trained to say no unless that area is specifically identified on the judicially enforceable search warrant. Saying yes, or opening the door will be construed as consent.

- Immediately after ICE agents arrive, the employer's attorney, immigration attorney, and union representatives should be contacted and asked to come to the worksite. The designated employee should ask for the name of the supervising ICE or other law enforcement agents, as well as the name of the U.S. attorney assigned to the case (if relevant). If it is a larger raid, the U.S. attorney might already be present onsite.

- The designated employee should be trained to document any search and seizure of property, either by openly video recording the keeping a list of items taken or people detained.

- Train employees not to separate into groups based on immigration status. This is a method ICE may try to use to get employees to disclose their status and target certain individuals. For example, they can ask employees who are undocumented to go into one group and everyone else to go into another group. Employees should be told not to move.

- Employees should be trained not to provide documents such as immigration documents or Visas, and should not allow them to randomly search the employee. Of course, if a judicially enforceable warrant specifies that this can be done, it has to be followed.

- Employer representatives should not give any statements to ICE agents or allow themselves to be interrogated. The employer can inform employees that they have a right to talk with agents as well as the right not to talk to agents, but the employer should not direct employees not to speak to agents when questioned.

- If agents want to access locked facilities, it is wise to unlock them and allow access. Otherwise, the agents will forcibly gain entry, causing property damage.

An employer should *not* engage in activities that could support a charge of harboring or obstructing justice such as hiding employees, helping them escape from the premises, providing false or misleading information, denying the presence of specifically named employees, or shredding documents.

An employer who wants to be particularly proactive can make information available to employees about what to do if ICE agents enter the workplace. There are "Know Your Rights" documents, videos, and other materials available for employers who want to do this. Of course, any training or information should be provided without regard to immigration status.

After a raid, employees will be taken to a detention center. The employer needs to decide, in conjunction with legal counsel, whether to arrange for counsel to represent them or help pay for the cost of the employee's attorney. The employer should ensure that the employee's family is contacted, and that it pays any money owed to the employee. The longer an employee remains detained, the greater the chance that the employee will be threatened and intimidated in order to provide evidence against the employer in exchange for work permits, an agreement not to prosecute the employee for identity theft, or other incentives. A conflict of interest arises between the interest of the employee and the employer, and the employer's attorney should therefore not also represent a detained employee.

ICE will determine who lacks the right to work and provide a "do not rehire" list of names. An employer who receives a notice from ICE that an employee is not authorized to work cannot continue to employ the person without taking the steps set forth in 72 Fed. Reg. 45611. Unless the "safe harbor" steps are followed, the employer risks liability for continuing to employ an unauthorized worker under a "constructive knowledge" standard.

Surveillance and investigation of the employer can continue for months or years after a raid. For example, ICE may investigate whether the same employees who were identified as being undocumented are returning to work under different names, being assigned to different work locations or different shifts to avoid detection. Undercover ICE agents may pretend to be applicants to see if they are hired after admitting they lack work authorization. ICE may try to create divisions among the targets of the investigation in order to obtain testimony from lower level supervisors or managers against the employer's executives. Employees can be questioned to see if they will testify against the employer in exchange for various incentives. ICE can also work in conjunction with one or more other agency, such as the IRS, Social Security Administration, or the Department of Labor.

After a raid, the employer should act quickly to assess its potential exposure and limit its liability. This includes securing separate counsel for each of the "targeted" employer representatives and for the employer. A private investigator who speaks the employees' language should be retained and interview all potential witnesses, including employees who were detained. The employer should immediately retain immigration counsel to develop and implement a program of corporate immigration compliance. This can help later in negotiating for a civil instead of criminal prosecution or for reduced sentences and fines. Of course, the employer should hire a legal workforce to replace employees arrested during the raid because it will need to keep its operations going. Management should be told not to do anything that could

be interpreted as suborning perjury, such as warning others not to talk to ICE or suggesting that they provide false or misleading information. Everyone should act based on the assumption that the person to whom they are speaking may be wired by ICE.

If only one of the employer's workplaces was raided, the employer should immediately do an audit at its other locations and promptly bring them into compliance.

The employer's attorneys should obtain copies of all relevant documents that were seized in order to see if there is any incriminating information. ICE will not copy the documents or incur any copying costs. The employer will have to arrange to have the documents copied at the office of ICE or the U.S. Attorney. The records are likely to be in disarray, since ICE doesn't want to leave a clear trail showing which documents have been reviewed.

The employer's own records should be returned to their original order so that files targeted for copying by the employer are not highlighted for ICE.

Since I-9s will almost certainly have been seized and may not be returned or copied for some time, the employer may decide to complete new I-9s for all current employees, after ensuring that training has occurred and that the new I-9s will be properly completed. These can later be attached to the original I-9s.

After all of the evidence has been reviewed and the employer's own investigation has been completed, its attorneys should meet with the employer representatives and decide whether to negotiate a plea pre-indictment or wait and see all the evidence against the employer and then decide whether to go to trial or enter a plea.

A raid can be very unsettling and disruptive to the employer's workforce, including those who have no need to fear the raid's personal consequences. Furthermore, a raid can suddenly decimate an employer's workforce, having an extremely negative impact on its operations.

ICE has recently stepped up its use of workplace raids, including the following:

- **August 28, 2018:** ICE arrested approximately 160 foreign nationals in a worksite raid conducted at Load Trail in Sumner, Texas. This company began as a family-owned business in 1996 and grew to employ more than 500 people on its 100-acre site. In 2014, the company paid a $445,000 fine for hiring undocumented immigrants to work at the plant.

- **August 9, 2018:** ICE arrested 133 foreign national workers during workplace raids at several businesses in Nebraska and Minnesota.

- **June 2018:** ICE arrested 146 foreign nationals at several facilities operated by Fresh Market in Ohio. During the same month, it arrested 114 foreign nationals during two workplace raids at two different locations of a flower and garden center company in Ohio.

- **April 25, 2018:** ICE arrested 13 individuals at 4 different restaurants in Kentucky.

- **April 5, 2018:** ICE arrested 97 immigrants at a meat processing plant in Tennessee. The investigation in this case started when the employer's bank asked the employer's officials why it was making large cash withdrawals every week. The employer responded that it was for payroll. After the bank provided this information, the IRS subpoenaed the employer's bank records, which of course confirmed these large cash withdrawals. Later, a confidential informant was sent to the employer and was hired without filling out an I-9 form. Based on this evidence and other evidence gathered in the investigation, ICE and the IRS raided the employer's facility.

- **January 2018:** ICE conducted workplace raids on 98 7-Eleven stores in 17 states and the District of Columbia. A total of 21 individuals were arrested on suspicion of being in the US illegally. Notably, ICE did not serve warrants during this operation, but rather served administrative notices of I-9 inspections.

- **February 22, 2017:** ICE arrested 55 foreign nationals during workplace raids at eight restaurants in Mississippi.

Even if an arrest is not made in connection with a workplace raid but rather in a different sort of enforcement action, employers are impacted by unexpected absences when employees are among those arrested.

5. ICE I-9 Audits

An I-9 audit is less dramatic and less immediately disruptive to an employer, but it can have extremely negative consequences if violations are found.

If the employer is not in compliance with the law, an I-9 inspection of their business will likely result in civil fines and could lay the groundwork for criminal prosecution, if they are knowingly violating the law.

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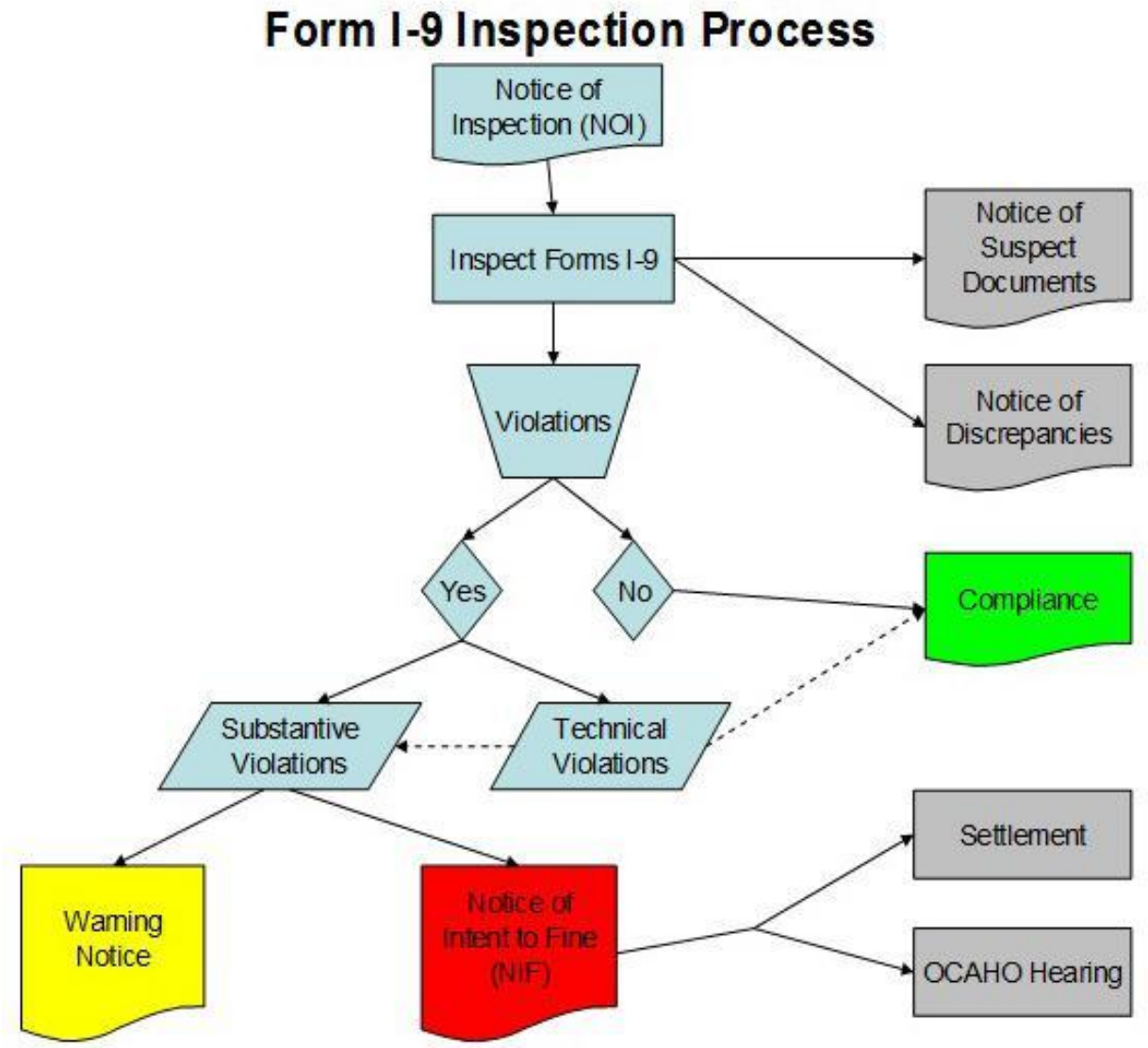
The Form I-9 inspection process can be described as follows:



A. The NOI and Employer Response

Normally, the audit is started by two ICE agents visiting the employer's workplace unannounced and serving a Notice of Inspection (NOI)/subpoena on the employer. The NOI alerts the employer that ICE is going to audit their hiring records to determine whether or not they are in compliance with the law. ICE may serve an NOI with an attached document list or with a subpoena. ICE may serve an NOI and subpoena at an employer's headquarters or at any of the employer's individual offices.

The NOI should clearly identify the employer subject to the I-9 audit. It should also specify whether the employer must produce I-9s for only current employees or for both current and terminated employees. The NOI will state that the employer has *three business days* to

gather and produce the required I-9 forms and supporting documentation to ICE. Supporting documentation that is typically required in addition to the I-9s is a copy of payroll, a list of current employees, a list of former employees for the past one to three years, Social Security Administration documents, IRS Form 940 and 940 employment tax documents, articles of incorporation, business licenses, and a list of companies that were contracted for work. The NOI and/or the agents will give the employer the option to waive the three-day notice period and immediately turn over the requested information. The employer should never waive the three days; waiver will result in the requirement to immediately produce all of the requested documents. The NOI typically identifies the date, time and location for turning over the I-9 forms and other requested documentation. An employer who receives an NOI should immediately contact its immigration legal counsel or hire one if the employer doesn't already have one.

The NOI should be treated like any other serious service of process and be immediately reported up the employer's reporting chain. It should also be given immediate attention. If the employer only allows certain designated representatives to accept service of legal process, the receptionist others likely to be the point of initial contact must immediately notify the appropriate person if an NOI is served. If the ICE officer asks questions while serving the NOI, the investigative record will include any information it receives. Therefore, it is important that employees likely to interface with an ICE agent at this stage should advise ICE that they are not authorized to speak on behalf of the employer.

The NOI and subpoena should be reviewed carefully. Typically the NOI/subpoena requests the original I-9 and a copy for all current and all terminated employees that were either hired within three years of the date of the NOI/subpoena or terminated within one year of the date of the NOI/subpoena. Some NOIs/subpoenas are more specific than others. The employer should be sure that it understands the scope of the NOI and subpoena and, if possible, narrow it. For example, it is possible that the NOI/subpoena will identify a time frame for terminated employees that does not correspond to employers' retention requirements. If the NOI/subpoena requests I-9s for terminated employees whose I-9 forms have been properly purged (i.e., the retention period for terminated employees is the later of three years from the date of hire or one year from the date of termination), the employer should notify ICE accordingly. Furthermore, it is possible that the NOI/subpoena will only request a subset of the possible documents it could request; in that case, the employer should only produce the requested subset. It is also possible that the NOI would request documents beyond the proper scope of an I-9 investigation, in which case the employer should communicate to ICE in writing the reasons why it believes the NOI or subpoena has an excessive scope.

In addition to I-9s, ICE may request the following kinds of documents:

— copies of employee documents such as those submitted during the hiring process (e.g., passports, Social Security cards, drivers' licenses, and other documents reviewed in connection with the I-9). Employers may choose whether or not to retain copies of the documents reviewed in connection with the I-9; if the employer chooses to do so, it must do so indiscriminately for all employees. 8 C.F.R.

274a.2(b)(D)(3). If the employer participates in E-Verify, then it must keep copies of employees' U.S. passports, U.S. passport cards, I-551s (Permanent Resident Cards, commonly called green cards), and I-776s (Employment Authorization Documents (EADS)).

— quarterly payrolls. The employer should keep a copy of its last two quarterly payrolls, including payments to independent contractors. Although an employer is not required to complete and maintain I-9s for independent contractors, it cannot knowingly hire independent contractors to employ foreign nationals who are not authorized to work lawfully in the U.S.

— list of employees. The employer should keep a list that includes each employee's full name, date of birth, Social Security number, hire date, and termination date, if applicable. If possible, the employer should provide its list of employees in electronic format such as an Excel spreadsheet.

— list of contractors. The employer should keep a list of all independent contractors/subcontractors including the full name, date of birth, Social Security number, and dates worked. If the independent contractor/subcontractor is a business entity, the employer should provide the Employer Identification Number (EIN), Taxpayer Identification Number (TIN), Social Security Number (SSN), and the contractor's address, telephone number, and email address. Again, if possible, this information should be provided in electronic format. The employer should also provide copies of all information provided to independent contractors, e.g., IRS Form 1099.

— service agreements with independent contractors.

— corporate documents such as its EIN, TIN, owners' SSN, addresses, telephone numbers, and email addresses, and articles of incorporation/organization.

— copies of business licenses.

— quarterly tax statements (IRS Form 941).

— Social Security No Match letters. The employer should keep copies of any prior correspondence from the Social Security Administration to the employer regarding mismatched or no-matched Social Security numbers, known as Employer Correction Requests or Requests for Employee Information and commonly referred to as No Match letters. (These are no longer being issued due to budgetary constraints.)

— E-Verify and SSNVS enrollment. The employer should keep documentation confirming whether the employer is a current or previous participant in E-Verify or the Social Security Number Verification Service (SSNVS) and, if so, provide the date(s) when the employer began using the program(s).

— copies of employee documents required by E-Verify. If the employer participates in E-Verify (or has in the past done so), it must provide copies of all results for E-Verify inquiries. In addition, it must provide copies of Permanent Resident Cards

and EADs for employees who provided those documents for employment verification and were hired after the employer began participating in E-Verify.

— SSNVS results. If the employer participates in the SSNVS (or has in the past done so), it must provide copies of all results for SSNVS inquiries.

After confirming the scope of the I-9 investigation, the employer must gather the documents that were requested.[8] Even if the employer believes that its I-9s and other documents are in order, it should use the three days to review all I-9s and requested documents and make any allowable corrections. In particular, make sure that each employee identified in the other documents that ICE requests has an I-9. For example, most NOIs request copies of the employer's payroll records and quarterly wage reports submitted to the appropriate state authorities. ICE requests these documents because it wants to identify all employees who received compensation. The employer should have I-9s for every employee on these documents who was hired after November 6, 1986.

The ICE agent should be treated in a professional manner, but as an acknowledged adversary. An employer should not approach the audit as a friendly exchange of information and documents. Any information that the employer's representatives or employees divulge to ICE will be part of the administrative record. Therefore, only designated individuals or legal counsel should communicate with ICE.

The ICE agent/auditor should provide contact information or a business card when serving an NOI. However, every ICE agent handles audits differently. Therefore, it is important for the employer to clarify the timeline, expectations, and process of the particular ICE agent who is conducting the audit. This includes clarifying any ambiguities in the NOI/subpoena, e.g.:

— What specific documents is ICE requesting (e.g., only I-9s or also supporting documentation)

— What format should the employer use (e.g., some ICE agents want payroll records in Excel or other electronic format rather than in hard copy)

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[8] Federal regulations allow employers to store I-9s on-site or off-site and in hard copy, on microfilm/microfiche, in an electronic format, or in any combination of these formats. 8 C.F.R. 274a.2(a)(2). Regarding electronically-stored I-9s, federal regulations provide that at the time of an ICE inspection, the person or entity required to retain the I-9s must (a) retrieve and reproduce (including printing copies on paper, if requested) only the I-9s electronically retained in the electronic storage system and supporting documentation specifically requested, along with audit trails. Generally, an audit trail is a record showing who has accessed a computer system and the actions taken within or on the computer system during a given time period, and (b) provide the requesting federal agency with the resources (e.g., appropriate hardware and software, personnel, and documentation) necessary to locate, retrieve, read, and reproduce (including paper copies) any electronically-stored I-9s, and supporting documents, and their associated audit trails, reports, and other data used to maintain the authenticity, integrity, and reliability of the records. 8 C.F.R. 274a.2(e). The employer should provide, if requested, any reasonably available or obtainable electronic summary files, such as a spreadsheet, containing all of the information fields on all of the electronically-stored I-9s requested. The employer is not required to maintain separate indexing databases for each system in comparable results can be achieved without separate indexing databases. The employer must retain only those pages of the I-9 on which the employer, its entities, or employees enter data.

- What is the exact time and date of the production (including whether the ICE agent will retrieve the documents or the employer should send or upload them)
- Is the NOI only for current employees, or does it also include terminated employees
- Which employer entities or locations are subject to the NOI (this can become an issue if the NOI is served at a remote office and not at the employer's headquarters; whether to raise this or not is a strategic question since typically if ICE only serves a single location and the NOI does not indicate otherwise, ICE is only auditing that location)

If the employer needs an extension of the document production deadline, it must submit a written request to ICE explaining why it needs an extension and provide a reasonable proposed timeline for when the documents will be produced. The ability to obtain an extension of time to provide the required documents seems to depend on the ICE office and the agent. It is advisable, however, not to ask for more than one week and usually only five days, since otherwise it will appear that the employer does not have the required documents. Furthermore, a request for a longer extension is more likely to be denied. It should never be assumed that ICE will grant an extension of the three-day deadline.

The ICE agents have the right to receive and inspect the originals of the employer's I-9 forms. The employer should copy all documents that it turns over to ICE. This is important not only so the employer knows exactly what ICE has, but also because ICE will often take several weeks or months to review the documents which is most often done at an ICE field office.

The employer should also request an inventory receipt from the ICE agent or auditor listing the documents that the employer produced to ICE. This document should obviously be retained. If ICE were to allege that the employer failed to produce documents listed in the NOI/subpoena, the inventory receipt would serve as evidence that the employer timely produced the documents that were requested.

If the employer fails to turn over I-9s for required employees, or employees listed on payroll records and quarterly wage reports, ICE will penalize the employer for failing to complete I-9s. This is a substantive violation (as opposed to the less serious technical violations). Therefore, the three days should be used to make every effort to ensure that all of the requested I-9s are produced.

B. ICE Review of Employer Response and Notification of Results

Once the employer provides the required documents, ICE agents or auditors then conduct an inspection of the Forms I-9 for compliance. They particularly check for substantive violations, such as incomplete or missing forms, as well as technical violations.

When technical or procedural violations are found, pursuant to INA §274A(b)(6)(B) (8 U.S.C. § 1324a(b)(6)(B)), the employer is given *ten business days* to make corrections.

Substantive violations are more serious violations that could have led to the hiring of an employee not authorized to work in the U.S. After turning over I-9 forms to ICE, the employer cannot correct a substantive error. Substantive errors subject the employer to civil fines.

All workers encountered during these investigations who are unauthorized to remain in the United States are subject to administrative arrest and removal from the country.

The employer may receive a monetary fine for all substantive and uncorrected technical violations.

An employer who is determined to have knowingly hired or continued to employ unauthorized workers under INA § 274A(a)(1)(a) or (a)(2) (8 U.S.C. § 1324a(a)(1)(a) or (a)(2)) will be required to cease the unlawful activity, may be fined, and in certain situations may be criminally prosecuted.

Additionally, an employer found to have knowingly hired or continued to employ unauthorized workers may be subject to debarment by ICE, meaning that the employer will be prevented from participating in future federal contracts and from receiving other government benefits.

ICE will notify the audited party, in writing, of the results of the inspection once completed. The following are the most common notices:

- **Notice of Inspection Results** – also known as a "compliance letter," used to notify a business that they were found to be in compliance. This is always a very welcome document, and the employer is not required to respond to it.
- **Notice of Suspect Documents** – advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has determined that an employee is unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing to employ that individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if they believe the finding is in error. The employer must give those employees on the list a copy of the notice and given them an opportunity to present acceptable documentation to ICE establishing employment eligibility. If the employee has acceptable documents, the documents must be submitted to ICE. The employer must terminate any employee who is unable to present acceptable documents. When reporting to ICE on the status of employees, the employer should explain all of the practices that it has implemented in good faith regarding employment verification to mitigate potential civil fines.
- **Notice of Discrepancies** – advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine their work eligibility. The notice will list the employees for whom ICE was not able to determine work eligibility. The employer must provide the employees on the list with a copy of the notice, and give the employee an opportunity to present ICE with additional documentation to establish their employment eligibility. If the employees

have acceptable documents, the employer must present the documents to ICE. The employer must terminate employees who are unable to present acceptable documents. When reporting to ICE on the status of employees, the employer should explain all of the practices that it has implemented in good faith regarding employment verification to mitigate potential civil fines.

— **Notice of Technical or Procedural Failures** – identifies technical violations identified during the inspection and gives the employer ten business days to correct the forms. After ten business days, uncorrected technical and procedural failures will become substantive violations.

— **Warning Notice** – issued in circumstances where substantive verification violations were identified, but circumstances do not warrant a monetary penalty and there is the expectation of future compliance by the employer. No response to ICE is needed. If the errors are less than 10%, ICE seems to be generally issuing a warning notice without a penalty.

— **Notice of Intent to Fine (NIF)** – may be issued for substantive or uncorrected technical violations, and violations for knowingly hiring and continuing to employ unauthorized employees. ICE and attorneys and special agents in charge determine the penalty amount in the NIF.

If a NIF is served, charging documents will be provided specifying the violations committed by the employer. The employer has the opportunity to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO) *within 30 days* of receipt of the NIF. If the employer takes no action after receiving a NIF, ICE will issue a Final Order from which there is no appeal. 8 C.F.R. 274a.9(f). After receiving a Final Order, the employer must pay the civil fines according to the terms specified in the Final Order.

If a hearing is requested, OCAHO assigns the case to an Administrative Law Judge (ALJ), and sends all parties a copy of a Notice of Hearing and government's complaint, thus setting the adjudicative process in motion.

The Notice of Hearing spells out the procedural requirements for answering the complaint and the potential consequences of failure to file a timely response. Many OCAHO cases never reach the evidentiary hearing stage because the parties either reach a settlement, subject to the approval of the ALJ, or the ALJ reaches a decision on the merits through dispositive prehearing rulings. The ALJ can uphold the fines, reduce the fines, or increase the fines.

C. Determination of Recommended Fine

Monetary penalties for knowingly hiring and continuing to employ violations range from $375 to $16,000 per violation, with repeat offenders receiving penalties, at the higher end. Penalties for substantive violations, which includes failing to produce a Form I-9, range from $110 to $1,100 per violation. In determining penalty amounts, ICE considers five factors: the

size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations.

The cumulative recommended fine set forth in the NIF is determined by adding the amount derived from the Knowing Hire / Continuing to Employ Fine Schedule (plus enhancement or mitigation) with the amount derived from the Substantive / Uncorrected Technical Violations Fine Schedule (plus enhancement or mitigation). Typically, the date of the violation is the date ICE conducted the Form I-9 inspection and not the date the Form I-9 was completed by the employer. INA 274A; 8 U.S.C. 1324a.

(i) Penalties for Knowingly Hire / Continuing to Employ Violations[9]

Employers determined to have knowingly hire or continuing to employ violations are required to cease the unlawful activity and may be fined. The agent or auditor will divide the number of knowing hire and continuing to employ violations by the number of employees for which a Form I-9 should have been prepared to obtain a violation percentage.

This percentage provides a base fine amount depending on whether this is a First Tier (1st time violator), Second Tier (2nd time violator), or Third Tier (3rd or subsequent time violator) case. The standard fine amount listed in the table relates to *each* knowing hire and continuing to employ violation. The range of the three tiers of penalty amounts are as follows:

Knowing Hire / Continuing to Employ Fine Schedule
(Effective for penalties assessed after January 27, 2017 whose associated violations occurred after November 2, 2015)

	Standard Fine Amount		
Knowing Hire and Continuing to Employ Violations	**First Tier $548 - $4, 384**	**Second Tier $4,384 - $10,957**	**Third Tier $6,575 - $21,916**
0% – 9%	**$548**	**$4,384**	**$6,575**
10% – 19%	**$1,140**	**$6,322**	**$8,547**
20% – 29%	**$1,754**	**$7,232**	**$11,177**
30% – 39%	**$2,411**	**$8,174**	**$13,807**
40% – 49%	**$3,069**	**$9,094**	**$16,568**
50% or more	**$3,726**	**$10,026**	**$19,242**

[9] Since the passage of IRCA in 1986, federal civil monetary penalties have been increased on two occasions in 1999 and 2008 pursuant to the Federal Civil Penalties Inflation Act of 1990, as amended by the Debt Collection Improvement Act of 1996. These adjustments are designed to account for inflation in the calculation of civil monetary penalties and are determined by a non-discretionary, statutory formula. (See 73 FR 10130 (February 26, 2008)

(ii) Penalties for Substantive and Uncorrected Technical Violations

The agent or auditor will divide the number of violations by the number of employees for which a Form I-9 should have been prepared to obtain a violation percentage. This percentage provides a base fine amount depending on whether this is a first offense, second offense, or a third or more offense. The standard fine amount listed in the table relates to *each* Form I-9 with violations. The range of the three tiers penalty amounts are as follows:

Substantive / Uncorrected Technical Violation Fine Schedule
(Effective for penalties assessed after January 27, 2017 whose associated violations occurred after November 2, 2015)

	Standard Fine Amount		
Substantive Verification Violations	**1st Offense $220 - $2,191**	**2nd Offense $220 - $2,191**	**3rd Offense + $220 - $2,191**
0% – 9%	**$220**	**$1,096**	**$2,191**
10% – 19%	**$548**	**$1,315**	**$2,191**
20% – 29%	**$876**	**$1,534**	**$2,191**
30% – 39%	**$1,205**	**$1,753**	**$2,191**
40% – 49%	**$1,534**	**$1,972**	**$2,191**
50% or more	**$1,862**	**$2,191**	**$2,191**

(iii) The New Calculation Approach

ICE has begun to add the number of paperwork violations to the number of hiring/continuing to employ violations as the numerator. This can result in significantly higher fines. For example, if the employer has 100 employees with 10 substantive paperwork violations and 20 hiring or continuing to employ violations, the employer would have 10 + 20 = 30 to calculate 30% violations. There is nothing in the ICE I-9 inspection page that mentions this method, and nothing has been formally issued instructing agents or attorneys to add the violations together.

(iv) Enhancement Matrix

The following matrix will be used to enhance or mitigate the recommended fine contained on the Notice of Intent to Fine. (*Id*.)

Enhancement Matrix

Factor	**Aggravating**	**Mitigating**	**Neutral**
Business size	+ 5%	- 5%	+/- 0%
Good faith	+ 5%	- 5%	+/- 0%
Seriousness	+ 5%	- 5%	+/- 0%
Unauthorized Aliens	+ 5%	- 5%	+/- 0%
History	+ 5%	- 5%	+/- 0%
Cumulative Adjustment	+ 25%	- 25%	+/- 0%

(v) Strategies for Potentially Negotiating the Fine

In reviewing and trying to negotiate the fine, employers can ask the following kinds of questions:

- Were the fines calculated in accordance with the statute as updated by the Department of Justice?
- What baseline and method was used to calculate the fine?
- What factors were used to elevate or reduce the level of the fine?
- Were the factor used appropriately?
- Did ICE apply the 5% enhancement for employment of unauthorized aliens to only those violations, or was the enhancement applied to all violations?
- Does the NIF double-count violations?
- Are there other errors in the calculations?

In deciding how to proceed, employers have to assess whether they should settle with ICE (regardless of whether the employer has been able to negotiate the fine to a lower amount) or challenge the fine with the OCAHO.

6. Who is Most At Risk?

According to ICE's January 2018 press release, worksite enforcement investigations often involve egregious violations of criminal statutes by employers and widespread abuses. Such cases often involve additional violations such as alien smuggling, alien harboring, document fraud, money laundering, fraud or worker exploitation. ICE also investigates employers who employ force, threats or coercion (for example, threatening to have employees deported) in order to keep the unauthorized alien workers from reporting substandard wage or working conditions. By uncovering such violations, ICE can send a strong deterrent message to other employers who knowingly employ illegal aliens.

ICE also stated that as the investigative arm for the Department of Homeland Security, ICE focuses its criminal investigations on the most egregious violators and concentrates its worksite inspection efforts on employers conducting business in critical infrastructure and national security interest industries/sectors (e.g. chemical, commercial facilities, communications, critical manufacturing, dams, emergency services, government facilities, information technology, nuclear reactors materials and waste, and transportation systems), or industries that typically employ a large percentage of undocumented workers (e.g., construction, landscaping, food processing, hospitality and restaurants).

In pursuing this strategy, ICE has stated that it applies risk assessment principles to critical infrastructure and worksite enforcement cases in order to maximize the impact of investigations against the most significant threats and violators.

In many instances, it seems that an investigation is triggered because ICE gets a tip from a disgruntled former employee or a current competitor.

California appears to be of particular interest. ICE issued 122 NOIs in the Los Angeles area alone over a 5-day period and a further 77 NOIs were served through Northern California, including San Francisco, San Jose, and Sacramento. However, California has not been alone; ICE has served NOIs throughout the Midwest and East Coast. No one is immune.

The Acting Executive Associate Director for HIS, Derek Benner, has said that he views HIS and the audits it does as akin to the work of the IRS. Employers should therefore anticipate that NOIs will become more routine. As the result, many employers are reprioritizing immigration compliance and considering outside and possibly internal audits.

A raid seems to most commonly occur because someone has made a complaint to ICE or provided them with information suggesting a violation. A raid can also result from an I-9 audit that leads ICE to believe that there are large numbers of undocumented employees working for the employer.

7. Maintaining I-9 Compliance and Proving Compliance

In this area, as in so much of life, the best defense can be a good offense. In other words, get in front of the problem before it becomes a problem. A don't ask-don't tell, head in the sand approach doesn't work.

IRCA requires employers to complete an I-9 form for each employee within three days of hire. Employers can demonstrate compliance by following the I-9 verification requirements and treating all new hires the same. This includes: completing the I-9 form in a timely manner for all new hires, permitting employees to present any document or combination of documents acceptable by law and not preferring one type of document over another (as long as the documents are unexpired, allowed according to the list of acceptable documents on the most current I-9, and appear to be genuine and issued to the person presenting them, they should be accepted); update and reverify the I-9 as needed.

An employer may decide to use an internal assessment of policies, processes, and a sampling of I-9s as the first step, and then decide whether a full I-9 review or broader cross-section is necessary. After identifying paperwork problems, missing I-9s, expired work authorizations, fraudulent documents, and other issues, prompt remediation is critical and should be done as quickly as possible. Being proactive can reduce fines and penalties and also a establish a good faith defense in the event of an ICE audit.

When conducting any level of review, the employer should not ignore government notification, including ACA health insurance notices and other unconventional Social Security no-match notifications (e.g., unemployment claims of individuals who did not work for the employer). Some employers are considering the use of E-Verify and other government-recommended best practices. An employer would be smart to review IMAGE best practices (see https://www.ice./gov/image) and consider attending an HSI IMAGE training session.

Ongoing training of the employee(s) responsible for I-9 compliance is critical. Forms change, acceptable documents change, and USCIS guidance is updated from time to time. This, combined with turnover of those responsible can result in the kind of problems that can cause serious consequences in the event of an ICE raid or audit.

The employer should establish a procedure for lawfully purging the I-9 for a terminated employee. When an employer terminates an employee, it should calculate the date when it can lawfully purge the terminated employee's I-9. As indicated above, this can be either three years from the date of hire or one year from the date of termination, whichever is later. 8 C.F.R. 274a.2(b)(D)(2)(A). After the purge date is determined,[10] the terminated employee's I-9 should be stored in an I-9 file reserved for terminated employees and arranged by termination date. One relatively easy way to do this is to have purge folders for each month for each year. Then, each month, the employer can purge all I-9s for terminated employees that are in the folder for the preceding month (e.g., in February 2020, all I-9s in the January 2020 purge folder would be destroyed). Timely purging files avoids the imposition of any liability for an I-9 that may not have been properly completed. Once an NOI or subpoena is served, however, the employer cannot purge I-9s for terminated employees and to do so would constitute obstruction of justice. Since terminated employees are usually not available or not willing to help the employer make correctable revisions to defective I-9 forms, the employer cannot eliminate liability for such mistakes if it doesn't regularly and lawfully purge I-9s of terminated employees.

It can be very helpful to maintain a complete and updated organizational chart, particularly if the employer has several related corporate entities throughout the U.S. The organizational chart should include all entities in all locations. Such a chart can be essential when explaining to ICE the employer's complex organizational structure and in potentially minimizing the scope of an I-9 investigation.

Smart employers also prepare for an ICE visit. It seems as if employers that had an ICE visit in the last 5 years may at risk for another visit as a follow-up.

Employers who are serious about compliance and being able to prove compliance with a minimum of time and trouble should:

(i) Develop a compliance program that includes regular training and updates to any staff who is responsible for providing, completing, collecting, and maintaining I-9s.

— Obtain and provide the responsible employees with a copy of the current version of the USCIS *Handbook for Employers.* This is available on the USCIS website and contains detailed information about compliance.

[10] If an employer hired an employee on November 1, 2018, and terminated that employee on January 1, 2019, the employer would determine the purge date by adding three years to the hire date (November 1, 2021), and one year to the terminate date (January 1, 2020). In this example, the later date of November 1, 2021 would be the purge date.

- Obtain and provide the responsible employees with a copy of the current "I-9 Central" information on the USCIS website; it provides additional information on the entire I-9 process.
- Use the current version of the I-9 form
- Deadlines by which each section of the I-9 must be completed
- The prohibition against requesting specific documents or more documents than the law requires
- What documents are acceptable, and what combination of documents can be used, as well as basic information about how to inspect and evaluate documents that the worker submits
- What sections the employer must complete and how to complete them
- Instructions on how to determine the retention date of each form
- The employer's policy on copying the documents called for in section 2 of the I-9 form
- Using a tickler system to comply with the obligation to reverify
- Designation of a manager who is trained about the I-9 obligations who is in charge of maintaining, reverifying, retaining and ultimately purging I-9s
- Know the storage location of all documents that ICE may request, including the information required if the employer maintains the documents in electronic format
- What to do if there is a question about a substantive or procedural issue
- How to handle an NOI or unannounced visit (e.g., who to contact in case ICE appears at the door; the fact that ICE generally has to provide 3 days' notice prior to an NOI inspection and even with an NOI, the employer is not required to make the I-9 forms immediately available without an administrative subpoena or warrant)

(ii) Prepare instructions for designated employees on what to do if an agent appears at the door or an NOI or subpoena is served, regardless of whether this occurs at the employer's headquarters or satellite location.

- Everyone should remain silent; don't volunteer information; state the employee is not authorized to speak on behalf of the employer and cannot consent to anything on the employer's behalf (such as waiving the three-day notice period)
- Who to contact internally and how to contact them, and the need to do this immediately
- How to contact the employer's employment/immigration attorney and that this should be done immediately
- Clear, concise instructions to employees at all locations that only the identified legal counsel is permitted to communicate with ICE agents or auditors

(iii) Conduct an internal audit and correct any problems.

In connection with an internal audit, an employer should keep these three things in mind: (a) it must have an I-9 on file for every active employee hired after November 6, 1986; (b) it must have an I-9 on file for every terminated employee for three years following the date of hire or one year following the date of termination, whichever is later; and (c) the current version of the I-9 form as of the date of hire or reverification must be used.

It is highly recommended that anyone involved in the internal audit have the current USCIS *Handbook for Employers* and I-9 Central information and refer to them often as issues and questions arise.

An employer who is going to conduct an internal audit should also consult the ICE "Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits" available on the ICE website.

Before conducting an internal audit, the employer should decide whether it is going to review all I-9s or a sample of I-9s. If a sampling approach is used, the employer should carefully consider how it is going to choose which I-9s to audit to avoid discriminatory or retaliatory audits, or the perception of a discriminatory or retaliatory audit. The selection criteria needs to be neutral and non-discriminatory. An internal audit should not be done on the basis of an employee's citizenship status or national origin, or in retaliation against any employee(s) for any reason. The employer should also consider whether the internal audit is or could be perceived to be discriminatory or retaliatory based on its timing, scope, or selective nature. The employer should document its procedure for selecting I-9s if it is not going to audit all of them. If the employer has a list of employees on Excel, there are Excel features that can make a random selection. A penalty for violations of the employer sanctions provision and the anti-discriminatory provision of the Immigration and Nationality Act (INA) can be imposed even if an internal audit has been performed.

Thus, before conducting an audit, the employer should consider the purpose and scope of the audit and how it will communicate information to employees (e.g., the reasons for the audit and what employees can expect from the process). This includes how it will field questions or concerns about the audit and how it will inform employees of that process. The employer should also determine how it will document its communications with employees and how it will ensure consistent standards when addressing any I-9 deficiencies revealed by the audit.

The best practice is to develop a transparent process for interacting with employees during any internal audit. This includes informing the employees in writing that the employer will conduct an internal audit of the I-9s, explaining the scope and reason for the internal audit, and stating whether the internal audit is independent of or in response to a government directive. Where a deficiency is discovered in an employee's I-9, the employer should notify the affected employee, in private, of the specific deficiency. The employer should prove the employee with copies of the employee's I-9, any accompanying I-9 documents, and any other documentation showing the alleged deficiency. If the employee is not proficient in English, the employer should communicate in the appropriate language, where possible. The employer should also

provide clear instructions for employees with questions or concerns relating to the internal audit on how to seek additional information from the employer to resolve their questions or concerns.

(iv) Gather the documents and items needed for an internal audit.

___ List of current employees hired since November 6, 1986

___ List of employees terminated in the past three years

___ Original or electronic copies of all I-9 forms (both current employee forms, as well as forms for terminated employees within current retention requirements)

___ Current version of Form I-9

___ Audit Log, confirming the date of the audit, who conducted the audit, confirming by name that the employer has a completed and reverified (if appropriate) I-9 form for all employees for which one is required, and identifying any employee that does not have an I-9 that meets the requirements

___ Discard any I-9s that are no longer needed (e.g., the employee was terminated more than 3 years ago)

___ Discard any I-9s that the employer may have for non-employees, e.g., volunteers, independent contractors, or consultants

It is helpful to have two sets of I-9s, i.e., those that are for current employees (in electronic or hard copy format) and those that are for terminated employees. Address the review and correct any deficiencies in the order of priority. Current employees who do not have an I-9 on file are the highest priority, and their eligibility to work in the U.S. should be verified as quickly as possible. The next highest priority are current employees' I-9 that are on file to ensure they have been completed properly and have been properly reverified if necessary. The lowest priority are the I-9s of terminated employees.

(v) Obtain I-9s for current employees who are missing them.

This includes employees for whom the employer has no I-9, or that is already identified as requiring a reverification that was not completed on time. The employer should promptly contact these employees and instruct them to bring documentation from List A or Lists B and C of the I-9. This communication should be firm, even if the employer wants to apologize that for whatever reason the documentation was lost or not collected at the beginning of employment (or reverified as required). The employer may want to remind the employee that the form must be completed under federal law and that the employee will not be able to continue working for the employer if the employee cannot provide the documents. It is best to communicate with each employee individually rather than in a group. The employer can either communicate verbally, by email, or by written document, or some combination. Copies of any communication should be kept in the I-9 audit file, and if the communication is verbal a memo confirming the date and nature of the communication with each employee should be put in the audit file.

The employer should establish a due date for the documents that is not too far in the distance. Indeed, asking an employee to bring documents the next day is a good idea, especially if the employee indicates that the documents are immediately available. Once the employee brings in the documents, the employer should meet with the employee and complete the I-9 immediately. As with the completion of any other I-9, the employer must view the originals of the documents that the employee is submitting. Use current dates when completing the I-9. The date of hire is the employee's actual date of hire, even if it is years earlier. Attach a short memo to the completed I-9 explaining that there was no I-9 on file and that the employee completed the I-9 at the time of the audit. This demonstrates that the employer is making a good faith effort at compliance.

Once the I-9 form is completed, the employee's name can be crossed off the audit list and the completed I-9 should be added to the file of I-9s for current employees.

Some employees will probably not be able to find their documents. The USCIS *Handbook for Employers* states that certain receipts may be acceptable for a designated period of time. It indicates that generally a receipt for a lost, stolen or damaged document will be acceptable for 90 days. There are also specialized receipts for refugees and lawful permanent residents. The employer cannot, however, rely on a receipt that falls outside of the expressly acceptable kinds of receipts as a substitute for documents that fulfill the requirements of the I-9. Furthermore, if the employee is not able to provide an original within the 90-day receipt period, the employer should either terminate the employee or place the employee on a leave of absence until the employee can provide the required documents. If the employer places an employee on a leave of absence, the employee should be advised that he or she may be able to resume working for the employer once proof of eligibility to work in the United States is presented. It is best to decide in advance how the failure to timely provide the documents will be dealt with, and then treat all employees in that category in the same way.

(vi) Conducting a review of the I-9 forms by section.

This is admittedly tedious, time-consuming and detail-oriented work. However, it is much better to do this when the employer is not under the extreme time pressure of an ICE audit.

As the I-9s are reviewed, if the form is complete and correct, it can be filed. If it needs further attention, it should be held aside and addressed.

In general, technical errors can be corrected on the existing I-9 form. A correction should be clearly indicated by using a different colored ink and initialing and dating the change with the current date. Substantive errors may require a new I-9. Refer to the I-9 Central information for technical and substantive errors.

Each of the following should be checked on each I-9.

Section 1 (note: only the employee can make a correctable revision/change to Section 1)

___ Name (Including other last names used, past or present), address and date of birth are

completed

___ Social Security number is entered if employer participates in the E-Verify program; otherwise this information is voluntary on the current I-9

___ Appropriate citizen/immigration status box is checked

___ Lawful permanent residents have provided their seven- to nine-digit Alien Registration Number (A-Number) or USCIS Number

___ Aliens have provided an Alien Registration Number/USCIS Number or Form I-94 Admission Number or Foreign Passport Number

___ Employee signed and dated the form no later than the first day of employment

___ Preparer or translator section is completed if someone other than the employee completed Section 1 on behalf of the employee

Section 2 (note: only the employer can make a correctable revision/change to Section 2)

___ Employee's name is entered as it appears in Section 1

___ The number is entered that correlates with the citizenship or immigration status box the employee selected in Section 1

___ One document from List A is listed and completed, or a combination of one document EACH from List B and List C are listed and completed

___ Documents have been entered into the correct section (e.g., List B item is, in fact, listed under list B and not List C or List A)

___ All required information is entered for each document

___ The documents listed must satisfy the requirements to provide both proof of identity and proof of eligibility to work in the U.S., but should not show overdocumentation (requiring more documents than necessary)

___ If photocopies of documents are kept, copies of documents are maintained for all employees.

___ The employee's first day of employment is entered (if this is missing, the employee can correct and initial and date the change)

___ All information in the certification section has been entered and a representative of the company has signed and printed his or her name and dated the form within three days of the employee's first day of employment

___ The business name and full address are entered

___ If documents or a signature is missing from Section 2, a new I-9 is needed

Section 3 (note: only the employer can make a correctable revision/change to Section 3)

___ Section 3 is completed only if the employee's work authorization expired or if the

employee was rehired within three years from the date the I-9 form was previously completed (Note: expired permanent resident cards and List B documents do not need to be reverified. However, these documents must not be expired when then I-9 is initially completed.)

___ If the employee's name changed, the new name is entered in block A

___ If documents or a signature is missing in Section 3 (when required) a new I-9 is needed

Correct Any Errors That Are Found:

Section 1 Errors: If there is an error in Section 1 of an employee's Form I-9, the employer should have the employee correct the error as follows:

___ Draw a line through the incorrect information. Do not use correction fluid or black out any information

___ Enter the correct information

___ Initial and date the correction

___ If a section was erroneously left blank in Section 1, the employee should complete the blank and initial and date the change with the current date

___ If a section was erroneously left blank in Section 1, the employee should complete the blank and initial and date the change with the current date

Note: Employees needing assistance to correct Section 1 can have a preparer and/or translator help with the correction. The employee, preparer and/or translator should:

___ Make the correction or help the employee make the correction by drawing a line through the incorrect information and entering the correction information

___ Have the employee initial and date the correction

___ Initial and date the correction next to the employee's initials

___ If a section was erroneously left blank in Section 1, the employee should complete the blank and initial and date the change with the current date, and the preparer should initial and date the added information next to the employee's initials and date

If the preparer/translator who helped with a correction or noted omitted information completed the preparer/translator certification block when the employee initially completed the I-9, the preparer/translator should not complete the certification block again. If the preparer/translator did not previously complete the preparer/certification block, the preparer/translator should:

___ Complete the certification block; or

___ If the certification block was previously completed by a different preparer/translator: (a) draw a line through the previous preparer/translator information and (b) enter the new preparer/translator information (and indicate "for corrections").

If the employee is no longer working for the employer, the employer should attach to the existing form a signed and dated statement identifying the error or omission and explain why corrections could not be made (e.g., because the employee no longer works for the employer).

Section 2 and 3 Errors: If there is an error in section 2 or 3 of an employee's Form I-9, the employer should:

___ Draw a line through the incorrect information (Note: Do not use correction fluid or black out any information; the original wording should remain readable.)

___ Enter the correct or omitted information (Note: if documents for Section 2 are written in the wrong columns, the employer can either draw a line through the incorrect information and write the corrected information and initial and date the change with the current date, or draw arrows from the information to the correct column heading and initial and date the change with the current date)

___ Initial and date the correction or omitted information

Note re Section 2: Documentation presented for Section 2 is sufficient as long as the documentation was acceptable under the requirements of the I-9 in effect at the time the I-9 was completed. As the lists of acceptable documents have changed over the years, the employer should not assume documentation in Section 2 is insufficient simply because it does not satisfy current I-9 rules or appear on the lists of acceptable documents currently in effect.

If Section 3 Is Not Complete: Remember, this section only needs to be completed during reverification when an employee's work authorization expires or the employer rehires the employee, and under current guidelines the employee meets the conditions to be able to use the original I-9. Thus, for many employees this section is appropriately blank.

If There Are Multiple Recording Errors: Where multiple recording errors are found, the employer should:

___ Complete the section containing errors on a new I-9 form

___ Ensure the current version of the I-9 form is used

___ Attach the new I-9 form to the original I-9 form

___ Attach an explanation describing why the employer made the changes and completed a new form

If The Form Doesn't Make Sense or There Are So Many Errors That Using The Original I-9 Would Be Prohibitive: If, for example, copies of documents do not match those listed on the

form, a new I-9 should be completed, using the current version of the I-9, the current date, the correct hire date in Section 2, and verify the employee's employment eligibility documents in Section 2. The original form should be stapled to the new I-9, together with a memo explaining why there are two I-9s.

If There Are Missing I-9 Forms: Where the employer is unable to locate an I-9 form for an employee who is required to have one, the employer should:

___ Have the employee complete section 1 of the current version of the I-9 form immediately

___ Inspect the employee's original documents and complete Section 2

___ Use current dates (Note: do not backdate the form except that the employee's original hire date should be entered in Section 2)

___ Do not continue to employ individuals who are unable to provide acceptable documents as required

___ Do not re-create the I-9 form without the employee's presence or without examining the employee's original documents

___ Do not re-create the I-9 form for terminated employees; rather, complete a note to file with an explanation

If the Internal Audit Reveals that the Wrong Version of the I-9 Was Completed: As long as the I-9 documentation presented was acceptable under the Form I-9 rules that were current at the time of hire, the employer may correct the error by stapling the outdated completed form to a blank current version, and signing the current blank version noting why the current blank version is attached (e.g., wrong edition was used at time of hire). As an alternative, the employer may draft an explanation and attach it to the outdated completed Form I-9 explaining that the wrong form was filled out correctly and in good faith.

Additional questions that may arise during an internal audit include:

What should an employer do when it discovers during an internal audit that (1) a Form I-9 for an employee was not completed or is missing, or (2) an entire section on the Form I-9 was left blank?

If a Form I-9 was never completed or is missing, the current version of the Form I-9 should be completed as soon as possible. If an original Form I-9 exists but either Section 1 or Section 2 was never completed, the employee (for Section 1) or the employer (for Section 2) should complete the section as soon as possible. In both scenarios, the employer should not backdate the form, but should clearly state the actual date employment began in the certification

portion of Section 2. The employer should attach a signed and dated explanation of the corrective action taken.[11]

May an employer complete new Forms I-9 for existing employees whose Forms I-9 do not contain sufficient documentation to meet employment eligibility verification requirements?

Yes. When a Form I-9 does not reflect that the employee provided sufficient documentation upon hire or reverification under Form I-9 rules current at the time of hire or reverification, an employer should ask the employee to present documentation sufficient to meet the requirements of the current version of the Form I-9. The employer should staple the completed and signed Section 2 or 3 of the current version of the Form I-9 to the employee's previous Form I-9, together with a signed and dated explanation of the corrective action taken. The employer should not backdate the Form I-9. An employer must give an employee the option to present acceptable documentation of the employee's choice to bring the Form I-9 into compliance with the INA.

What should an employer do if an internal audit uncovers photocopies of Form I-9 documents that do not appear to be genuine or to relate to the individual who presented them?

The standard for reviewing I-9 documentation during an internal audit does not change from the standard applied during the initial employment eligibility verification process. An employer is required to accept original I-9 documentation that reasonably appears to be genuine and to relate to the individual presenting the documentation. If an employer subsequently concludes that a document does not appear to be genuine or to relate to the person who presented it, the employer should address its concern with the employee and provide the employee with the opportunity to choose a different document to present from the Lists of Acceptable Documents. An employer may not conclude without foundation that a photocopy of an employee's I-9 documentation is not genuine or does not relate to the individual. In the context of an internal audit, for an employer that has photocopied I-9 documentation, it should recognize that it may not be able to definitively determine the genuineness of I-9 documentation based on photocopies of the documentation. An employer should not request documentation from an employee solely because photocopies of documents are unclear. Furthermore, an employer cannot use I-9 audits to discriminate against, retaliate against, and/or intimidate employees and should not terminate employees, unless the employee cannot demonstrate identity and/or work authorization.

May an employer request specific documents when correcting a Form I-9 as a result of an internal audit?

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[11] Sample language for a correction memo is: "Memo to Form I-9 File, Corrections Made, [Date], [Employee Name], Pursuant to [Employer Name]'s private internal audit of its I-9 Forms conducted on [Date Range of Audit], it determined that the I-9 for the above employee contained certain errors. It is [Employer Name]'s intention to correct any deficiencies with regard to its IRCA responsibilities as quickly as possible. Therefore, [Employee Name and Title of person making the correction] made corrections to the form (or added a newly executed form where corrections to the original were infeasible) on [Date] in order to ensure the compliance of [Name of Employer]'s required records. [Name of Person Signing Memo and Making the Change, and Date]."

No. While an employer may specify that the particular document called into question by the internal audit may not be used again for Form I-9 purposes, the employer should not request specific documents. The employee should be permitted to present his or her choice of other documents, as long as they are acceptable for employment eligibility verification purposes.

What should an employer participating in E-Verify do if it discovers through an internal audit that it did not create E-Verify cases for all employees hired after the employer enrolled in E-Verify?

Unless an employer is a federal contractor with a federal contract that contains an E-Verify clause, it generally cannot use E-Verify for existing employees. Thus, where the employer was enrolled in E-Verify but did not use the system as a business practice, it should not go back and create cases for any employees hired during the time there was deliberate non-use of E-Verify. However, if an employer learns that it inadvertently failed to create a case in E-Verify, the employer should bring itself into compliance immediately by creating a case for the employee. An employer should consult U.S. Citizenship and Immigration Services for further information at 1-888-464-4218, or by e-mail at E-Verify@dhs.gov.

What should an employer participating in E-Verify do if it discovers during the internal audit that it terminated an employee based on the receipt of a tentative non-confirmation (TNC)?

E-Verify requires employers to provide employees with an opportunity to contest their TNCs and to allow employees to work-without any delay or adverse action-while they are contesting their TNCs. An employer that discovers that it took adverse action against an employee who contested his or her TNC should consider taking corrective action, such as extending an offer of re-employment to the affected individual, or if corrective action is not possible, documenting why the employer was unable to take corrective action. The failure to provide employees with an opportunity to contest their TNCs and to work while contesting their TNCs violates the E-Verify memorandum of understanding and may also constitute discrimination based on citizenship status or national origin in violation of the anti-discrimination provision of the INA, depending on the facts of the case.

May an employer require its existing employees to complete a new Form I-9 instead of conducting an internal audit because many existing Forms I-9 appear to be deficient?

An employer should be very cautious about obtaining new I-9s from its existing employees (absent acquisition or merger) without regard to whether a particular I-9 is deficient or without reason to believe that systematic deficiencies in the employer's employment eligibility verification process call the integrity of all previously completed I-9s into question. Without sufficient justification, requiring an existing employee to complete a new I-9 may raise discrimination concerns. Where new I-9s are completed for existing employees, however, they should be stapled to the original I-9s, and not backdated. Finally, the same discrimination, retaliation, and intimidation concerns implicated by conducting internal audits also apply to obtaining new I-9s from existing employees.

What should an employer do if, when consulted about the results of the internal audit, an employee admits that he or she is not work-authorized?

The employer sanctions provision of the INA makes it unlawful for a person or other entity, after hiring an alien for employment, to continue to employ the alien knowing that the alien is, or has become, unauthorized for employment. By regulation, "knowing" includes not only actual knowledge, but also knowledge which may be fairly inferred through a notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about an individual's unlawful employment status.

Must an employer always provide employees with a minimum of 90 days to provide Form I-9 documentation where alternative documentation is requested?

No. The employer sanctions provision of the INA makes it unlawful for a person or other entity, after hiring an alien for employment, to continue to employ the alien knowing that the alien is, or has become, unauthorized for employment. The employer should provide all employees who claim they are work-authorized with a reasonable amount of time to address any deficiencies associated with their I-9s and should not summarily discharge employees without providing a process for resolving the discrepancy. The 90-day period set forth in *U.S. Department of Homeland Security Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45611* (Aug. 15, 2007), was rescinded; the 90-day period is not a legally binding regulatory requirement. An employer should recognize that some documents may take up to or more than 120 days to obtain. The reasonableness of a timeframe should be determined on a case-by-case basis. Factors to consider include, for example, the specific nature of the deficiency and the time required for alternative Form I-9 documentation to be obtained under the circumstances. In addition, all employees who are asked to present alternative documentation should be given the choice of acceptable documents to present (they do not have to use the same document used previously) and should not be treated differently based on perceived or actual citizenship status or national origin. Some employees may not have the same document(s) in their possession that they originally presented for the I-9, either because they have misplaced the document(s), their immigration status has changed, the document has since expired, or for other reasons.

U.S. Immigration and Customs Enforcement (ICE) presumes that an employer has acted reasonably if it takes appropriate actions to resolve the apparent employment of unauthorized employees within 10 days of receiving a Notice of Suspect Documents letter. In the context of an internal audit, should an employer also provide employees only 10 days to present acceptable alternative documentation?

No. The 10-day period is an ICE policy that applies solely when ICE has issued a Notice of Suspect Documents letter. In these cases, ICE has already determined the employee at issue does not appear to be presently work-authorized. This time period has no bearing on the amount of time an employer may provide its employees to address discrepancies discovered through an internal audit. It is important to remember that the employer sanctions provision of the INA states that it is unlawful to continue to employ an individual once the employer has actual or constructive knowledge of the employee's unauthorized employment status.

What should an employer do if the employee is unable to present acceptable documents within what the employer has determined to be a reasonable amount of time?

An employer should consider the reasons for an employee's inability to present acceptable documentation and determine whether an extended period of time would be appropriate based on the particular circumstances on a case-by-case basis. An employer should be sure to allow or disallow additional time based on objective non-discriminatory and non-retaliatory criteria and without regard to an individual employee's citizenship status or national origin. The employer should document the basis for its decision and continue to document the efforts of the employee to obtain acceptable Form I-9 documentation.

Is an employer required to terminate employees who, as a result of the employer's internal I-9 audit, disclose that they were previously not employment-authorized, even though they are currently employment-authorized?

No. This is not required by law. In cases where an employee has worked without employment authorization or with a false identity or fraudulent employment document(s), and the employee has subsequently presented acceptable documentation(s) and is currently employment-authorized, the employment eligibility verification provisions do not require termination of employment. An employer may continue to employ the employee upon completion of a new I-9 noting the authorizing document(s), and should attach the new I-9 to the previously completed I-9 together with a signed and dated explanation.

Should an employer use a third party auditor when conducting an internal I-9 audit?

An employer may delegate a third party to conduct an internal I-9 audit. However, an employer that relies on third party auditors is not immune from penalties imposed for violating the employer sanctions provision or the anti-discrimination provision of the INA. An employer remains liable for any violations committed by the third party.

May an employer audit a particular employee's I-9 in response to a tip that the employee is not work-authorized?

An employer violates the employer sanctions provision of the INA if it continues to employ an employee with actual or constructive knowledge that the employee is unauthorized to work. While tips concerning an employee's immigration status may lead to the discovery of an unauthorized employee, tips and leads should not always be presumed to be credible. An employer is cautioned against responding to tips that have no indicia of reliability, such as unsubstantiated, retaliatory, or anonymous tips. Heightened scrutiny of a particular employee's I-9 or the request for additional documentation from the employee based on unreliable tips may be unlawful, particularly if the tip was made based upon retaliation, the employee's national origin, or perceived citizenship status.

Should an employer use the Social Security Number Verification Service (SSNVS) during an internal audit?

No. According to the SSNVS Handbook, "SSA will verify [Social Security numbers] and names solely to ensure that the records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement)," handbook, page 4. Additionally, the SSNVS handbook states that any notification about a mismatch makes no statement about an employee's immigration status. Rather, it simply indicates an error in either the employer's records or SSA's records and should not be used as a basis to take adverse action against an employee. In other words, SSNVS is not intended to be used to verify employment authorization in connection with the I-9 process. For further information about the proper use of SSNVS, please see the SSNVS Handbook.

A Note About Copies of Employee-Provided Documents: Except for the E-Verify requirements to retain photocopies,[12] the employer is not required to make and keep copies of the documents provided by the employee in connection with the I-9, but some employers like to do so. If the employer has decided to do this, the photocopies should be made of the documents provided by all employees, and attached to the I-9. If the employer's decision has been and will continue to be to copy employee-provided documents, and if there are missing copies of some of these documents, the employer should ask employees for copies of those documents now and attach the copies to the I-9, together with a memo clearing indicating that it did an I-9 audit, that the copy of the document was missing, and that the employer obtained the copy during the audit process (the current date should be included, and the memo should be attached to the I-9). On the other hand, if the employer's past intent was to make copies of employee-provided documents but it is changing this practice in the future and no longer plans to make copies, the employer should write a memo and put it in the I-9 audit file, explaining that it performed an I-9 audit and found the fact that some I-9s prior to the audit date had copies and some did not; the memo should also explain that that the employer has made the business decision not to keep copies of employee-provided documents on a going forward basis. This will show a good faith effort that the employer recognizes the error of having some but not all copies of employee-provided documents and explain why there are not copies of these documents after the audit date. However, the employer should keep any copies from the past until the retention period for the I-9 has expired, or after consulting with an attorney. In any event, the copies of these documents cannot be used for any other purpose. Making and keeping copies of the documents does not relieve an employer of the obligation to fully complete Section 2; similarly, it is not an acceptable substitute for the correct completion of the I-9.

(vii) Terminated employees' I-9s:

Once an employee is terminated, the employer is required to keep that employees' I-9 for the later of three years after the employee's date of hire or one year following the date of

[12] If an employer participates in E-Verify, and the employee provides a document used as part of Photo Matching (currently a U.S. passport and passport card, Permanent Resident Card (Form I-551), and the Employment Authorization Document (Form I-766)), the employer must retain a copy of the document. Other documents can be added to Photo Matching in the future.

termination. If, during the audit, the employer finds a problem with the I-9 of a terminated employee that requires the terminated employee's input (e.g., missing information that the employer does not have, missing documents, missing signature), the employer will obviously not be able to correct the problem. The problem and the fact that the employer was not able to correct it should be noted on the I-9 audit log and on a memo (dated and initialed) attached to the I-9. For problems that do not require the employee's input, the employer should make the correction, initial and date it, attach a memo (dated and initialed) explaining the issue and correction, and also enter that information in the audit log.

Complete the Audit Log Entry and File the Corrected Form I-9:

___ As the employer corrects each I-9, it should add the correction to its I-9 audit log

___ File the I-9 form in proper I-9 file (either current employee or terminated employee)

(Note: The goal is to organize the I-9s and clearly document the steps the employer took during the audit. Retain the audit logs and communications to employees regarding the audit process. It is a good idea to keep the audit documentation in a separate I-9 audit file or place this documentation in the files with the I-9 forms themselves. Write the information as clearly as possible, with the realization that it may be read in the future by someone who was not involved in the audit and has no idea what was done, why it was done, when it was done, by whom it was done, or what corrections were made.)

(viii) Updating or reverifying I-9s:

If an employee is rehired within three years of the original hire date, the employer has the option to reverify the employee's employment authorization instead of completing a new I-9. If the original I-9 has been replaced by a newer version, however, then a new I-9 must be completed.

Every employer should have a practice in place addressing updates and reverifications of I-9s, together with a tickler system to alert it when the date to do so is coming up. All required reverifications and updates must be completed on time, and personal name changes must be handled consistently.

This practice should include:

- Creating a spreadsheet list all I-9s that need to be reverified by date and reviewing it monthly.
- Creating tickler dates 90 and 30 days before the expiration date to notify and remind the employee that the employee must provide a new document and to remind the employee of which documents are acceptable. It is a good idea to include information about the consequences of not providing the required documentation by the expiration date. The employee's supervisor should also be notified that the employee may not perform any work after the expiration date if documentation is not provided in time.

- Establishing a policy and procedure if an employee fails to reverify their work authorization on time, i.e., either the employee will be put on a leave of absence or terminated until the necessary documents can be provided.
- Set a policy about whether updating the documentation is required if there is a name change for a personal reason.
- Deciding whether, as policy, rehires will need to complete a new I-9 or if Section 3 will be used.

As with the initial I-9, an employee can present any unrestricted document from List A or List C to show continued or permanent authorization to work in the U.S. The employer cannot specify which document types it will accept, or suggest a preference for one over another. If a Social Security card is provided, it cannot contain any restrictions regarding employment eligibility, such as "Not Valid for Employment."

The document shown for reverification does not need to be the same type of document shown for the employee's initial I-9.

If the employee has changed names unrelated to the work authorization, no documentation is required to be shown to the employer for updating purposes. The employer may ask the employee for the basis of the name change to be reasonably assured of the employee's identity and claim to the name change. The employer may also accept evidence of a name change if it is provided by the employee, and keep it with the I-9 to document the action.

When an employee's employment authorization expires, the employer must reverify to ensure the employee is still authorized to work. Section 1 of the I-9 contains the date that employment authorization expires, and Section 2 contains the date that the employment authorization document expires. Note: the employment authorization expiration date provided by an employee in Section 1 may not match the document expiration date recorded by the employer under List A or List C in Section 2. For reverification purposes, the employer should use the earlier date to determine when reverification is necessary.

It is smart to remind the employee, at least 90 days before the date reverification is required, that the employee will be required to present a List A or List C document (or acceptable receipt) showing continued employment authorization on the date that their employment authorization or documentation expires. If the employee has a From I-765 (Application for Employment Authorization) pending with USCIS, and the application has been pending for 75 days, the employee can call the National Customer Service Center or schedule an InfoPass appointment at a local office to request expedited processing.

Employers should not reverify:

- U.S. citizens
- Lawful permanent residents who presented a Form I-551 (permanent resident card) for Section 2

— List B documents

Unless reverification does not apply, when the employee's employment authorization or employment authorization documentation expires, the employee must present unexpired documentation from either List A or List C showing the employee is still authorized to work.

To complete Section 3, the employer should:

— Examine the documentation to determine whether it appears to be genuine and relate to the employee who is presenting it. As with the initial I-9, if it does not appear to be genuine and relate to the employee, the employee should be allowed to present other documentation from the List of Acceptable Documents.

— Record the document title, document number, and expiration date, if any

— Sign and date Section 3

If Section 3 was previously completed, or if the version of the I-9 is no longer valid, the employer must complete Section 3 on a new I-9 using the most current version and attach it to the previously completed I-9.

If the employee is being rehired within three years of the original hire date and is still authorized to be employed on the same basis as on the original I-9, the employer may complete block B and the signature and date blocks. If the employee is being rehired within three years of the original hire date but the previously-used work authorization has expired, the employer should examine the new document provided and complete block B, block C and the signature and ate blocks.

As with the initial I-9, if the employer keeps copies of documents provided for From I-9 purposes, a copy should be attached to the I-9.

If the employee has provided documentation that indicates permanent authorization to work in the U.S. (e.g., permanent resident card or unrestricted Social Security card), then no further reverification will be needed during the employee's employment. The employer should update its I-9 reverification spreadsheet with the reverification date and status (permanent authorization) and file in its completed I-9 file. If the documentation indicates another temporary work authorization period, the employer should update its reverification spreadsheet with the first reverification date and the new expiration date when the employees work authorization will need to be reverified.

If the employee cannot obtain renewed work authorization, the employer should follow its policy or practice regarding whether to place the employee on a leave to absence to allow additional time to obtain the necessary documentation, or to terminate the employee.

8. Special Considerations: The California Conundrum

California has three key state laws that put employers in a real bind. In addition, many cities in California and other states have passed laws declaring themselves to be "sanctuary

cities." The definition of a "sanctuary city" varies from local law to local law, but generally city employees are prohibited from cooperating with federal immigration authorities.

At the California state level, the three laws, which became effective January 1, 2018, are:

1. AB 450

AB 450, the Immigrant Worker Protection Act, provides employees of both public and private employers with protection from immigration enforcement while on the job. Govt. Code sections 7285.1, 7285.2, 7285.3; Labor Code sections 90.2, 1019.2. Its provisions include:

- employers and their representatives cannot allow federal immigration enforcement agents to enter non-public areas of a business without a judicial warrant or federal law (although an employer can invite immigration officers into a nonpublic area, where no employees are present, in order to verify the existence of a warrant);
- employers and their representatives cannot provide voluntary consent to a federal immigration enforcement agent to access, review or obtain employee records without a subpoena or judicial warrant; however, this restriction does not apply to Form I-9 or other documents for which an NOI was provided to the employer; and
- employers must follow specific requirements related to Form I-9 inspections and audits by Immigrations and Customs Enforcement (ICE):
    - within 72 hours of receiving a NOI, they must post a notice at the worksite in a language normally used to communicate employment-related information to employees, informing employees that an immigration agency has issued an NOI and will conduct inspections of Forms I-9 or other employment records. The posted notice must identify which agency has issued the notice, provide the date that the notice was received, describe the nature of the inspection (to the extent known), and include a copy of the NOI of Forms I-9. This notice must also be given to the collective bargaining representative (if any);
    - they must provide a copy of the NOI to an affected employee upon reasonable request;
    - within 72 hours of receiving the inspection results, the employer must provide each current "affected employee" and the employee's collective bargaining representative (if any) a copy of the inspection results and a written notice of the employer's and employee's obligations arising from the inspection. The notice must describe any and all deficiencies or other items identified in the inspection results that relate to that employee, state the time period for correcting any potential deficiencies, state the time and date of any meeting with the employer to correct any identified deficiencies, and inform the employee of their right to representation during any meeting scheduled

with the employer. The notice must only relate to the specific employee, and must be hand-delivered at the workplace if possible. If hand-delivery is not possible, the notice should be delivered by mail and email.

An "affected employee" is one identified by the inspection results as potentially lacking work authorization or having document deficiencies.

Under the new law, employers are prohibited from re-verifying the employment documentation of current employees unless otherwise required to comply with the Immigration Reform and Control Act (IRCA) or E-Verify. Employers should keep in mind that California law prohibits terminating an employee because they present new documentation for Form I-9 and work authorization eligibility, and that E-Verify can only be used for new hires.

The California Labor Commissioner and Attorney General have exclusive enforcement rights; there is no private individual cause of action for violations of this new law. However, the penalty for a first violation can range between $2,000 and $5,000, and subsequent violations could result in a fine of between $5,000 and $10,000. In addition, the Labor Commissioner can recover up to a $10,000 penalty for each instance an employer re-verifies the employment eligibility of a current employee at a time or in a manner not required by federal law.

Thus, this law prohibits private employers from *voluntarily* cooperating with federal immigration officials—including officials conducting worksite enforcement efforts and other enforcement operations. It also requires that private employers notify employees in advance of a potential worksite enforcement inspection—despite clear federal law that has been on the books for approximately three decades that has no such requirements. An April 22, 2017, report on AB 450 compiled by the California State Assembly's Committee on Judiciary states that the law is designed to frustrate "an expected increase in federal immigration enforcement actions." California has demonstrated its intent to enforce this law: on January 18, 2018, California Attorney General Becerra issued a warning to employers in the state that his office would "prosecute those who violate [AB 450] by voluntarily cooperating with Immigration and Customs Enforcement (ICE) efforts." Additionally, failure to comply with AB 450 could result in a fine for the business owner ranging from $2,000-$10,000. California employers are thus caught between what many may feel is a civic duty to cooperate with the enforcement of federal law, and a state government that penalizes such lawful cooperation.

Employers with facilities in California should identify "public" and "nonpublic" areas in their facilities, and ensure that employees are familiar with the difference and location of these areas. Under this law, when an ICE agent arrives, that person must be kept within the "public" area of the facility, except where the employer might take the ICE agency briefly to a nonpublic area where no employees are present, solely for the purpose of verifying a judicial warrant, provided the employer does not give consent to search nonpublic areas in the process. This may be difficult to do, depending on the facility's layout. Therefore, designated employees should be trained on what to do.

The law can affect employers outside of California as well. If the employer maintains its employee records in a central location and if any of its employees are California employees, care must be taken to prevent access to the employer's employee records absent a search warrant or subpoena. This means, for example, that it is important to maintain I-9s separate from employee personnel files (which is supposed to be done in any event). Under this law, however, it becomes even more important because if the I-9 of a California employee is part of the employee's personnel file, if the employer waives the three-day notice rule, or provided the employee records in defense of the immigration inspection, it probably violated California law at least with respect to its California employees.

Furthermore, an employer with California employees that becomes the subject of an ICE audit must give its California employees (and their exclusive bargaining representatives, if any) the notices required under this law. It must also provide additional information within 72 hours of receiving any notice from ICE to its "affected employees" in California.

An employer with California employees is also prohibited from reverifying the employment eligibility of a current California employee in violation of federal law. An example would an attempt to reverify an expiring green card, or improperly conducting an I-9 audit that reverifies employees unnecessarily.

An employer with California employees is thus faced with the potential of two expensive violations, i.e., the U.S. DOJ's IER Section, and a civil penalty of up to $10,000 by the California Labor Commissioner.

In March 2018, the U.S. Department of Justice, filed a preemption lawsuit in the federal District Court for the Eastern District of California against the State of California, its governor and Attorney General seeking declaratory and injunctive relief based on the enactment and implementation of the three California laws, to stop California from interfering with federal immigration authorities, including the imposition of fines against employers ranging from $2000 to $10,000 for failure to comply with AB 450. The lawsuit only challenged the provisions of AB 450 with respect to private employers, but not public employers. *United States of America v. The State of California, et al.,* U.S. District Court, Eastern District of California, Case No. 18-264.

In July 2018, a U.S. District Court judge issued a preliminary injunction suspending the following with respect to private employers:

- requirement that an employer request a judicial warrant from immigration enforcement agents before allowing them access to private areas of the worksite;

- requirement that an employer request a judicial warrant or subpoena before releasing private employee records; and

- prohibition on employers from reverifying the status of any current employee unless required by federal law.

This means that a private sector employer can no longer be prosecuted under state law for (a) consenting to a federal immigration enforcement agent's request to enter nonpublic areas in the workplace; (b) granting federal immigration enforcement agents access to employees' records; or (v) reverifying an employee's eligibility to work in the United States.

It should be noted that an employer can still decide on their own to voluntarily follow the above provisions in AB 450, and any such provisions in a labor agreement remain valid and binding; however AB 450 cannot mandate that private employers comply with these provisions.

The court *rejected* the federal government's request to suspend the provision of AB 450 that requires an employer to notify its employees if the employer receives a NOI for I-9s or other employment records as well as the results of the inspection. Therefore, this part of AB 450 remains in effect.

The California Labor Commissioner has published a template for employee notification, which is included at the end of this handout.

On August 7, 2018, the federal government filed an appeal on both of the district court's orders (which include orders regarding other state immigration-related laws). On October 19, 2018, the Eastern District filed an order granting the federal government's motion to stay the proceedings pending appeal. 2018 WL 5310675. Stay tuned!

2. SB 54

This law does not directly require employers "as employers" to do anything. It restricts state and local law enforcement officials from providing information to federal immigration authorities about the release date of removable criminal aliens who are in their custody. These criminal aliens are subject to removal from the United States under federal immigration law, and the federal government has taken the position that SB 54 interferes with federal immigration authorities' ability to carry out their responsibilities under federal law. The federal government has also taken the position that SB 54 also violates 8 USC 1373, a law enacted by Congress, which promotes information sharing related to immigration enforcement. The state law also prohibits the actual transfer of criminal aliens to federal custody, which ICE contends creates a dangerous operating environment for ICE agents executing arrests in non-custodial settings. In a declaration provided to the Court, ICE Deputy Director Thomas Homan stated that these "at-large arrests. . .unquestionably involve a greater possibility of the use of force or violence by the target . . . and have greater access to weapons, exposing officers, the public, and the alien to greater risk of harm." This law amended Sections 7282 and 7282.5 of the Government Code, added new provisions beginning at Section 7284 of the Government Code, and repealed Section 11369 of the Health and Safety Code.

3. AB 103

This law amended, added to, and repealed numerous provisions of state law. It does not directly implicate employers "as employers." It imposes a state-run inspection and review scheme of the federal detention of aliens held in facilities pursuant to federal contracts. This includes review of immigration processes and the circumstances in which aliens were apprehended, and also requires access to privileged federal records that are under ICE's control. With this law, California is trying to regulate federal immigration detention, which the federal government contends it cannot do under the Constitution, pointing out that California does not impose such an inspection and review scheme on other similar detention facilities that do not house civil immigration detainees—in other words, this is a special review regime that applies only to facilities that house civil immigration detainees.