

SURVIVING AN I-9 INSPECTION CONDUCTED BY U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (“ICE”)

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I. INTRODUCTION AND INSPECTION TRENDS

A. Immigration and Nationality Act

1. 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.
2. 8 C.F.R. § 274a.2 designates the Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification.
3. The employer must ensure that the individual properly completes the following:
 - a. Completes section 1 - “Employee Information and Verification” - on the Form I-9 at the time of hire and signs the attestation with a handwritten or electronic signature; and
 - b. Present to the employer documentation establishing his or her identity and employment authorization.
4. Within three business days of the hire, an employer must complete the following:
 - a. Physically examine the documentation presented by the individual establishing identity and employment authorization and ensure that the documents presented appear to be genuine and to relate to the individual; and
 - b. Complete section 2 - “Employer Review and Verification” - on the Form I-9 within three business days of the hire and sign the attestation with a handwritten signature or electronic signature.

5. Employers are required to maintain for inspection original Forms I-9 for all current employees.
 6. For former employees, retention of Forms I-9 are required 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.
- B. Traditional targeted industries
1. Traditionally, ICE targeted industries known to employ immigrant workers, including the following:
 - a. Construction
 - b. Hospitality
 - c. Food preparation
 - d. Health care
 - e. Retail
- C. Modern trend
1. ICE inspections are expected to increase 400% from 2017.
 2. ICE inspections will no longer target certain industries or small companies; rather inspections will be conducted large and small scale among any industry.
- D. The big raid
1. January 10, 2018, ICE served notices of inspection on 98 7 Eleven convenience stores in 17 states, including Michigan.
 2. It is the largest operation against an employer so far under the Trump administration.
 3. 21 arrests were made.
 4. Criminal and civil penalties against 7 Eleven are pending.
 5. The head of ICE's homeland security investigations ("HSI"), Derek Benner's, statements regarding the 7 Eleven raid:

- a. "This is what we're gearing up for this year and what you're going to see more and more of is these large-scale compliance inspections, just for starters. From there, we will look at whether these cases warrant an administrative posture or criminal investigation."
- b. "It's not going to be limited to large companies or any particular industry, big medium and small," he said. "It's going to be inclusive of everything that we see out there."

6. Statements from Thomas Homan, director of ICE:

- a. Today's actions send a strong message to U.S. businesses that hire and employ an illegal work force. ICE will enforce the law, and if you are found to be breaking the law, you will be held accountable." - Thomas D. Homan, the acting director of Immigration and Customs Enforcement.
- b. Homan stated he will "significantly" increase work site raids because immigrants will be more hesitant to illegally enter the U.S. if there are no jobs for them. He ordered ICE agents to ramp up their work site investigations by "four to five times."
- c. Homan stated "agents will not target one side of the employment equation, as past administrations did."
- d. On January 15, 2018, Homan stated that ICE inspections will "increase 400%."

E. Asplundh Tree Experts Co. inspection

- 1. Asplundh is a tree trimming and brush clearing company headquartered in Willow Grove, Pa. The company hired and rehired employees across the United States by accepting identification documents it knew to be fraudulent.
- 2. A six-year HSI audit and investigation revealed that the company decentralized its hiring so upper level management could remain

willfully blind while supervisors and general foremen (lower level management) hired ineligible workers, including unauthorized aliens, in the field. Hiring was by word of mouth referrals rather than through any systematic application process, which allowed Supervisors and General Foremen to hire a work force that was readily available and at their disposal.

3. This model perpetuated fraudulent hiring practices that, in turn, maximized productivity and profit. With a motivated work force, including unauthorized aliens willing to be relocated and respond to weather related events around the nation, Asplundh had crews which were easily mobilized that enabled them to dominate the market.
4. The company agreed to a record breaking settlement for civil fines in the amount of \$95 million.

II. THE INSPECTION PROCESS

A. Notice of Inspection (“NOI”)

1. The administrative inspection process is initiated by the service of a Notice of Inspection (“NOI”) upon an employer compelling the production of Forms I-9.
2. Employers are provided with at least three business days to produce the Forms I-9.
3. ICE will request the employer provide supporting documentation, which usually includes a copy of the payroll, list of current employees, Articles of Incorporation, and business licenses.

B. Violations

1. Procedural / Technical (terms are used interchangeably)
 - a. Minor violations that do not prohibit ICE from determining the employment eligibility status of the employee.

- b. Common technical violations include the following (this list is not exhaustive, but includes common examples):
- i. Use of the Spanish version of the I-9, except in Puerto Rico;
 - ii. Failure to ensure an individual provides her maiden name, address, or birth date in Section 1;
 - iii. Failure to ensure a Lawful Permanent Resident or alien authorized to work provides his alien number ("A" Number) in Section 1 of the I-9 (it will be technical only if the "A" Number is provided in Sections 2 or 3 of the Form I-9 or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
 - iv. Failure to ensure the individual dates Section 1 at the time employment begins;
 - v. Failure to ensure a preparer and/or translator provide his or her name, address, signature, or date;
 - vi. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in Section 2 or 3, but only if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;
 - vii. Failure to provide the title, business name and address in Section 2;
 - viii. Failure to state "Individual underage 18" in Column B, for employees under the age of 18 using only a List C document; and
 - ix. Failure to provide the date of rehire in Section 3.

- c. When technical or procedural violations are found, an employer is given ten business days to make corrections.
 - d. If corrections are properly made within the ten day period, the violations will not be fined. However, uncorrected technical or procedural violations will be deemed substantive violations and subject to fines.
 - e. In situations where the employee cannot be located to make the correction, a written explanation should be provided to ICE as to why the correction cannot be made. If Ice determines that the explanation is reasonable, it may avoid a fine.
3. Substantive violations
- a. Violations that prevent ICE from determining the employment eligibility status of the employee.
 - b. Common substantive violations include the following (this list is not exhaustive, but includes common examples):
 - i. Failure to timely prepare or present the I-9;
 - ii. Failure to ensure that the individual provides his or her printed name in Section 1 of the Form I-9;
 - iii. Failure to ensure the individual checks a box in Section 1 of the Form I-9 attesting to whether he is a citizen or national of the United States, a lawful permanent resident (LPR), or an alien authorized to work until a specified date, or checking multiple boxes;
 - iv. Failure to ensure an LPR or alien authorized to work provides his or her "A" Number in Section 1 of the Form I-9 (only applies if the "A" Number is not provided in Sections 2 or 3 of the Form I-9 or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);

- v. Failure to ensure the individual signs the attestation in Section 1;
 - vi. Failure to complete Section 2 within 3 business days of hire;
 - vii. Failure to review and verify a proper List A document or proper List B or List C documents in Section 2 or Section 3;
 - viii. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A or proper List B and List C documents in Section 2 or 3, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;
 - ix. Failure to provide the date employment begins in Section 2 of the I-9;
 - x. Failure to sign the attestation in Section 2 of the Form I-9;
 - xi. Failure on the part of the employer to print his/her name in the attestation portion of Section 2;
 - xii. Failure to date Section 2 of the Form I-9;
 - xiii. Failure to date Section 2 within three business days of the date the individual begins employment.
 - xiv. Failure to sign Section 3 of the Form I-9;
 - xv. Failure to date Section 3 of the Form I-9; and
 - xvi. Failure to date Section 3 of the Form I-9 not later than the date of the expiration of the work authorization.
- c. A ten day period is not permitted to correct substantive violations.

- d. Knowing violation – knowingly hired, or to have knowingly recruited or referred for a fee, an unauthorized alien for employment in the United States or to have knowingly continued to employ an unauthorized alien in the United States.

C. Types of notice you may receive after inspection

1. Notice of Inspection Results – also known as a "compliance letter," used to notify a business that they were found to be in compliance.
2. 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.
3. 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 employer should provide the employee with a copy of the notice, and give the employee an opportunity to present ICE with additional documentation to establish their employment eligibility.
4. 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.
5. 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.

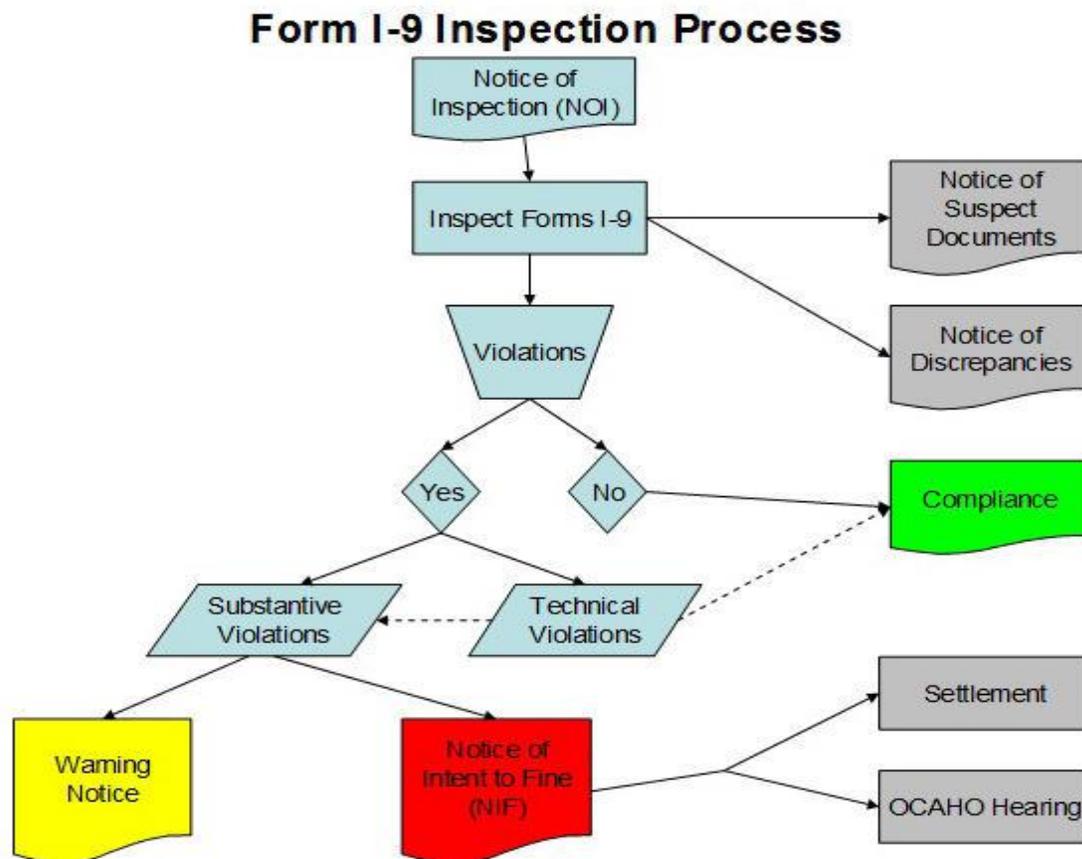
6. Notice of Intent to Fine (“NIF”) – may be issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations.
 - a. In instances where a NIF is served, charging documents will be provided specifying the violations committed by the employer. The employer has the opportunity 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.
 - b. If the employer takes no action after receiving a NIF, ICE will issue a 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.

D. Penalties

1. The five factors that ICE (supposedly) considers when issuing a fine:
 - a. Size of the business
 - b. Good faith effort to comply (not a defense to substantive violations)
 - c. Seriousness of violation
 - d. Whether the violation involved unauthorized workers, and
 - e. History of previous violations
2. Substantive verification violations (and uncured technical violations) – fines range from \$220 to \$2,191 per violation.
 - a. Aggravating circumstances may increase fine to exceed \$2,191 per violation.
 - b. Examples of aggravating circumstances

- i. Large percentages of employee I-9 forms are non-compliant with 8 CFR 274A
 - ii. Multiple knowing violations
 - iii. Repeat offenses
3. Knowingly hire and continuing to employ violations – fines range from \$375 to \$16,000 per violation, with repeat offenders receiving penalties at the higher end.

E. Inspection process flow chart



Graphic courtesy of U.S. Immigration and Customs Enforcement www.ice.gov

III. FORM I-9 COMPLIANCE

A. Section 1 – employee

1. Every new hire must fill out Section 1.
2. If you or anyone else assists the employee with Section 1, the translator box must be filled-out.
3. Email, phone, and SSN are optional in Section 1.
4. Full name, address, and date of birth are required.
5. Check correct citizenship status box:
 - a. If employee is on work authorization, expiration date must be provided and Alien Registration Number (or USCIS #).
6. Employee must sign and date.
7. Caution – do not forget to complete translator section if you assist the employee with any part of Section 1. ICE agents compare handwriting between Section 1 and Section 2 and it is easy to catch. Failure to follow procedure could subject you to criminal penalties.

B. Section 2 – employer

1. Employer must review and confirm the identifying information provided by the employee.
2. Person completing section 2 must be person that reviewed identifying information.
3. List A or List B and List C must be properly recorded. For a complete list of appropriate documents, visit <https://www.uscis.gov/i-9-central/acceptable-documents>.
 - a. Common list A documents – establishes both identity and employment authorization.
 - i. Passport
 - ii. Permanent resident alien card

- iii. Employment authorization card
 - b. Common list B documents – establishes identity only.
 - i. Driver license
 - ii. State identification card
 - iii. Voter identification card
 - iv. School identification card
 - c. Common list C documents – establishes employment authorization only.
 - i. Social security card
 - ii. Birth certificate
 - 4. Employer must record date of hire and sign Section 2 and records date of execution.
- C. Section 3 – Re-Verification
- 1. Required when an employee’s work authorization expires (aliens on temporary work authorization) or for re-hires hired within three years of completion of original I-9.
 - 2. Must be completed on or before expiration date.
 - 3. Must use most recent Form I-9.
 - 4. Must be completed when employee on temporary work authorization has a name change.
 - 5. US citizens and Lawful Permanent Residents are exempt.
 - 6. Caution – Put a system in place to calendar re-verification dates.
- D. Making corrections to Form I-9
- 1. Only the employee can correct Section 1.

- a. Reminder – if the employee no longer works for the company and cannot be located, write a memo to ICE explaining why the defect cannot be cured.
 2. Use a different color pen and initial all changes.
 3. Use a new Form I-9 if necessary, but do not dispose of or destroy old Form I-9s. Simply attach the new revised Form I-9 to the old Form I-9.
 4. Do not back date Form I-9s.
- E. Form I-9 retention requirements
1. For former employees, the employer may destroy employee I-9s three years after date of hire or one year post-termination, whichever is longer.
- F. Tips for compliance
1. Implement a system as part of the hiring process that includes full completion of Form I-9 for each new hire
 - a. Be sure that Section 1 is completed by the employee on the date of hire and Section 2 is completed by the employer within three days of the date of hire.
 - b. We often see Form I-9s that are only partially completed and then fall through the cracks. This often results in fines being incurred during an ICE inspection.
 2. Incorporate a calendaring system to re-verify employees working on temporary authorizations.
 - a. Employers often forget to re-verify employees. For example, if you have an employee that has been working pursuant to a temporary work authorization that is renewed yearly for the last ten years, but you only completed a Form I-9 on the initial hire

date, then you will be cited for nine violations for that employee and fined accordingly during an ICE inspection.

- b. Currently, we are seeing several employment authorizations not being renewed or taking several months, leaving the employee in an expired state. This may subject you to a significant fine for a knowing violation for employing an unauthorized alien.
3. Organized records
 - a. Each employee personnel file should include the Form I-9 and copies of the identifying documents used in Section 2.
 4. Yearly audits
 - a. All of your Form I-9 records should be reviewed at least once yearly to ensure you are remaining compliant. This will avoid significant fines and alleviate substantial stress if/when you receive that NOI from ICE.

IV. MITIGATING AND DEFENDING A POST-INSPECTION FINE FROM ICE

- A. Retention Limitations – 8 CFR 274a2(b)(2)(i)
 1. An employer must retain Form I-9s for each employee three years from the date of hire or one year post-termination, whichever is longer. Any former employee I-9s outside this scope are exempt from inspection and fines.
- B. Substantial Compliance
 1. Substantial Compliance is an affirmative defense designed to avoid hardship on a party that does all that can be reasonably expected of it to comply with Form I-9 requirements.
 2. Substantial Compliance will not protect an employer if the verification errors could lead to the hiring of unauthorized aliens.
 3. To succeed with a Substantial Compliance defense, the following criteria must be met:

- a. The use of an INS Form I-9 to determine an employee's identity and employment eligibility;
- b. The employer's or agent's signature in Section 2 under the penalty of perjury;
- c. The employee's signature in Section 1;
- d. In section 1, a check mark or some other means attesting under the penalty of perjury the employee is either a citizen or national of the United States or a lawful permanent resident or an alien authorized to work until specified date; and
- e. Some type of information or reference to a document spelled out in Section 2, List A, or Lists B and C must be provided.

C. Good Faith Defense – knowing violations only

1. An employer who shows good faith compliance with the employment verification requirements of 274a.2(b) shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring. At the very least it will serve as a mitigating circumstance.
 - a. This defense will not apply to paperwork violations (technical and substantive violations discussed above), which includes failure to properly prepare an I-9 form.

D. The Eight Amendment excessive fines clause

1. A fine that is so excessive that it outweighs the gravitational relationship to the offense it is designed to punish violates the Excessive Fines Clause of the Eight Amendment. The question is one of proportionality.
2. Argue the five factors – the size of the business of the employer being charged; the good faith of the employer; the seriousness of the

violation; whether or not the individual was an unauthorized alien; and the history of previous violations of the employer.

E. Other defenses

1. The employee must have received wages or remuneration from the employer to be subject to inspection.
2. Procedural issues
 - a. Pay attention to exact wording on NOI. Employers often make the mistake of producing Form I-9s for subsidiaries or other related companies, which were not requested for inspection.
 - b. Service issues.
3. Staffing companies and Professional employment organizations (“PEO”).
 - a. Staffing companies – as a general rule, the staffing company is responsible for Form I-9 retention and responding to NOI.
 - b. PEO – as a general rule, the employer will be responsible Form I-9 retention and responding to NOI.
 - c. Note that (a) and (b) are general rules; there are exceptions and it often will depend on the degree of control that the company has over the employee and contractual language with the staffing or PEO company.

F. What are we seeing?

1. A significant increase in ICE inspections since January 1, 2018
2. Large and small scale inspections – companies with 15 employees to several hundred employees
3. Fines averaging \$750 to \$1,300 per violation – strongest factors appear to be size of company and history of compliance
4. ICE will fine anything and everything it finds, even for I-9s produced that are outside the scope of inspection

5. ICE looks favorably upon companies that are proactive about Form I-9 compliance. It is imperative to contact counsel to assist with production of your Form I-9 records when you receive a NOI.
6. Proper responses to a notice of intent to fine often results in significant reductions in the fine