

FORM I-9 COMPLIANCE AND UPDATES

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I. FORM I-9 AUDIT AND INSPECTION UPDATES

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. 2018 ICE Audit Surge - <https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-fy18-surge>
1. Immigration and Customs Enforcement ("ICE") opened 6,848 worksite investigations compared to 1,691 in 2017;
 2. ICE initiated 5,981 I-9 audits in 2018, compared to 1,360 in 2017;
 3. ICE made 779 criminal and 1,525 administrative worksite-related arrests IN 2018, compared to 139 and 172 in 2017,
 4. All of the above statistics surged by 300 to 750 percent from 2017 to 2018.
 5. U.S. businesses were ordered to pay more than \$10.2 million in fines as a result of Form I-9 violations.
 6. Home Land Security ("HSI") Executive Associate Director, Derek Benner, made recent statements indicating the ICE's Form I-9 inspections will continue to be a priority in the future:
 - a. "Reducing illegal employment helps build another layer of border security, and reduces the continuum of crime that illegal labor facilitates, from the human smuggling networks that facilitate illegal border crossings to the associated collateral crimes, like identity theft, document and benefit fraud and worker exploitation."
 - b. "Employers who use an illegal workforce as part of their business model put businesses that do follow the law at a competitive disadvantage. HSI is committed to upholding the laws that govern worksite enforcement. These laws help protect

jobs for U.S. citizens and others who are lawfully employed, reduce the incentive of illegal migration, eliminate unfair competitive advantages for companies that hire an illegal workforce, and ultimately help strengthen public safety and national security.”

- c. HSI’s worksite enforcement strategy continues to focus on the criminal prosecution of employers who knowingly break the law, and the use of I-9 audits and civil fines to encourage compliance with the law.

C. 2018 Big Raids

1. In April 2018, HSI executed a federal search warrant at a slaughterhouse in Bean Station, Tennessee, and arrested 104 aliens on immigration violations. The owner of the company pled guilty to tax fraud, wire fraud and employing illegal aliens. He faces various prison time and fines, and he has agreed to pay \$1.4 million in restitution before his sentencing.
2. In August 2018, HSI executed a series of criminal arrest warrants for 17 individuals connected to an alleged criminal conspiracy to exploit illegal alien laborers for profit, fraud, wire fraud and money laundering, and served search warrants for worksite violations at agricultural firms in Nebraska, Minnesota and Nevada.
3. In August 2018, HSI executed criminal search warrants at a trailer manufacturer in Sumner, Texas, and arrested 160 people on immigration violations, many who were using stolen identities of U.S. citizens.

D. Tips for compliance and inspections

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 should have a folder with 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 Notice of Inspection (“NOI”) from ICE.

5. Responsive documents to an ICE NOI must be properly reviewed before producing and organized.
6. Do not consent to an immediate inspection if ICE agents show up without warning. You have up to three days to respond to an NOI.
7. Carefully review the NOI and only produce exactly what is asked for. Caution – ICE may fine you for Form I-9 violations even if you accidentally produce Form I-9 records outside the scope of the NOI.

E. Types of 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.

2. 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.

F. 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 Forms I-9 are non-complaint with 8 CFR 274A
 - ii. Multiple knowing violations
 - iii. Repeat offenses
3. Knowingly hire and continuing to employ violations – fines range from \$548 to \$21,916 per violation (depending on severity), with repeat offenders receiving penalties at the higher end.
- G. Defending a post-inspection fine from ICE
1. Substantial Compliance
- a. 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.
 - b. Substantial Compliance will not protect an employer if the verification errors could lead to the hiring of unauthorized aliens.

- c. To succeed with a Substantial Compliance defense, the following criteria must be met:
 - i. The use of an INS Form I-9 to determine an employee's identity and employment eligibility;
 - ii. The employer's or agent's signature in Section 2 under the penalty of perjury;
 - iii. The employee's signature in Section 1;
 - iv. 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
 - v. Some type of information or reference to a document spelled out in Section 2, List A, or Lists B and C must be provided.
- 2. Good Faith Defense – knowing violations only
 - a. 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.
 - b. This defense will not apply to paperwork violations (technical and substantive violations discussed above), which includes failure to properly prepare an I-9 form.
- 3. The Eighth Amendment excessive fines clause
 - a. 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 Eighth

Amendment. The question is one of proportionality.

- b. 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.

II. COMPLETING AND CORRECTING FORM I-9

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 on or before first day of working for wages or remuneration.
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 **physically** review and confirm the identifying information provided by the employee.

- a. This means that you must have a practice and procedure in-place to physically inspect and confirm the identifying information for all employees in the employee's presence.
 - b. Issues arise for remote hires.
 - c. You may hire an authorized representative, such as a notary, to handle section 2 for remote hires.
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 care
 - 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. You must use your judgment when reviewing the employee's

documentation – if the documentation appears genuine, then accept it as is. If the documentation appears fraudulent, you must request something more or reject the applicant for hire.

5. 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 rehires that are rehired 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.
7. Seasonal employees
 - a. If the seasonal employee has a continuing expectation of employment, then Section 3 nor a new Form I-9 are required when the employee returns to work.
 - b. If the seasonal employee does not have a continuing expectation of employment, and the rehire is within three years of the original Form I-9, then Section 3 may be used.
 - c. If the seasonal employee is rehired after three years from original Form I-9, then a new Form I-9 is required.

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 note to the file explaining that the defect was recognized, but could not 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.
 5. Note your HR file that you conducted an internal audit and address corrections that were identified, but could not be made. This may avoid a fine and result in leniency from ICE during an inspection.
- 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.

III. EVERIFY AND FORM I-9

A. E-Verify basics

1. E-Verify is an internet-based system that compares information from Form I-9 (SSN and photo ID) to government records to confirm that an employee is authorized to work in the U.S.
2. E-Verify is not mandatory in Michigan (E-Verify is mandatory in certain states).
3. E-Verify is not a substitute for Form I-9. Rather, it is a safeguard that will provide a presumption of innocence to a knowing violation.

- B. E-Verify results and employer options
 - 1. Result is "Employment Authorized"
 - a. Means that the Form I-9 information matches Department of Homeland Security ("DHS") and Social Security Administration ("SSA") Records.
 - 2. Result is "Tentative Nonconfirmation"
 - a. Means that the Form I-9 information does not match DHS or SSA records.
 - 3. Employer options if result is "Tentative Noninformation"
 - a. If the employee contests the result, then the employer may not take any adverse action against the employee until it received a "Final Nonconfirmation" result.
 - b. If the employee does not contest the result, then the employer may terminate the employee.

IV. HANDLING FORM I-9 DURING MERGERS AND ACQUISITIONS

- A. Two Options
 - 1. Treat employee as a "new hire"
 - a. Employer may choose to treat employees who are continuing their employment with the related, successor, or reorganized employer as new hires and complete a new Form I-9.
 - b. Employers who choose to complete a new Form I-9 may do so before the merger or acquisition takes place as long as the employer has offered the acquired employee a job and the employee has accepted the offer.
 - c. The employee must complete Section 1 no later than the first day of employment and the employer or the authorized representative must complete Section 2 within

3 business days of the employee's first day of employment.

- d. Employers should enter the effective date of the acquisition or merger as the date each of these employees began employment in Section 2 of their new Form I-9.

2. Treat employee as "continuing employment"

- a. Employers may treat the employee as continuing in employment, in which case, employers must obtain and maintain the previously completed Form I-9.
- b. **Buyer Beware** - Employers who choose to keep the previously completed Form I-9 **accept responsibility** for any errors or omissions on those forms.
- c. **Caution** - Employers should review each Form I-9 with the employee and update or reverify the employee's information, as necessary.

V. WHAT ARE WE SEEING?

- A. A significant increase in ICE inspections since January 1, 2018.
- B. Large and small scale inspections – companies with 15 employees to several hundred employees.
- C. Significant and excessive fines issued by ICE after an inspection is performed.
- D. A substantial delay in responses from ICE after a fine is challenged.
- E. ICE will negotiate if the fine is properly challenged.
- F. ICE's inspection results often include errors or leave the door open for appeal.
- G. ICE looks favorably upon companies that are proactive about Form I-9 compliance. It is imperative to conduct annual internal form I-9 audits.