

Form I-9 Compliance and Updates

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Agenda

- Form I-9 Audit and Inspection Updates
- Completing and Correcting Form I-9
- Everify and Form I-9
- Handling Form I-9 During Mergers and Acquisitions

Form I-9 Audit and Inspection Updates

- Immigration and Nationality Act, 8 U.S.C. 1324a
 - Governs the unlawful employment of aliens, including, Form I-9 compliance
 - Matters reviewed by the Office of the Chief Administrative Hearing Officer (“OCAHO”)
 - OCAHO opinions are appealable to the federal court of appeals

Form I-9 Audit and Inspection Updates

- Big picture overview of employer responsibility for completing Form I-9
 - Ensure employee completes Section 1 on first day of hire
 - Physically review employee documentation establishing identity and employment authorization
 - Complete Section 2 within three days of hire
 - Monitor Section 3

Form I-9 Audit and Inspection Updates

- 2017 ICE audit statistics
 - ICE opened 1,691 worksite investigations
 - ICE conducted 1,360 Form I-9 audits
 - ICE made 139 criminal and 172 administrative worksite arrests (worksite violations)

Form I-9 Audit and Inspection Updates

- 2018 ICE audit surge!
 - ICE opened 6,848 worksite investigations
 - ICE conducted 5,981 Form I-9 audits
 - ICE made 779 criminal and 1,525 administrative worksite arrests (worksite violations)
 - U.S. businesses ordered to pay more than \$10.2 million in fines
 - 300% to 700% increase from 2017

Form I-9 Audit and Inspection Updates

- Home Land Security Agenda
 - “Reducing illegal employment builds another layer of border security.”
 - “Employers who use an illegal workforce as part of their business model put businesses that follow the law at a competitive disadvantage.”
 - IMAGE is growing

Form I-9 Audit and Inspection Updates

- Voluntary program
- Uses Everify
- Includes ICE employment training on hiring procedures
- “IMAGE Certified” status – expected to become industry standard

Form I-9 Audit and Inspection Updates

- 2018 Big raids
 - HSI executed a federal search warrant at a slaughterhouse in Bean Station, Tennessee.
 - Arrested 104 aliens on immigration violations.
 - The owner faces prison time and fines.
 - Owner settled for \$1.4 million.
 - Several other large scale inspections pending

Form I-9 Audit and Inspection Updates

- Quick tips for compliance
 - Organized hiring process that includes completion of Form I-9
 - Calendaring system for employees needing re-verification (section 3)
 - Organized Form I-9 records
 - Yearly internal audits
 - Properly review and prepare responsive documents to an NOI

Form I-9 Audit and Inspection Updates

- Do not waive three day period to respond to NOI
- Produce responsive documents only and nothing more!
- Remote employees – use an authorized agent or notary to review the identifying information

Form I-9 Audit and Inspection Updates

- Types of violation during an inspection
 - Technical / Procedural Violations
 - Minor violations that do not prohibit ICE from determining employment eligibility status
 - Ten business days to make corrections
 - Provide written explanation if employee cannot be located to cure Section 1

Form I-9 Audit and Inspection Updates

- Common examples include:
 - Employee failure to provide maiden name, address, or date of birth
 - Failure to properly date Section 1
 - Preparer or translator information
 - Failure to properly record List A or List B and List C document information (**must send copies**)
 - Failure to provide the title, business name and address in Section 2

Form I-9 Audit and Inspection Updates

- Substantive violations
 - Prevent ICE from determining eligibility status
 - Common examples include:
 - Failure to prepare I-9
 - Employee failure to check citizenship status box in Section 1
 - Employee failure to sign Section 1

Form I-9 Audit and Inspection Updates

- Failure to complete Section 2 within 3 business days of hire
- Failure to provide proper List A or List B and List C documents or information (**no copies**)
- Section 2 dates – hire date and completion
- Employer failure to sign Section 2
- Failure to complete Section 3

Form I-9 Audit and Inspection Updates

- Knowing violation
 - Knowingly employing an unauthorized alien
 - Do not turn a blind eye to suspicious List A, List B, or List C documents
 - Good faith is a defense (explained below)
 - Warrants harshest fine

Form I-9 Audit and Inspection Updates

- Common notices from ICE
 - Notice of Inspection – audit notice
 - Notice of Technical Failures – may cure within 10 days
 - Notice of Intent to Fine – you are being fined for violations
 - Always challenge the fine

Form I-9 Audit and Inspection Updates

- Penalties for violations
 - Five considering factors
 - Size of the business
 - Good faith effort to comply
 - Seriousness of violation
 - Involvement of unauthorized workers, and
 - History of previous violations

Form I-9 Audit and Inspection Updates

- Fines for substantive violations
 - Range from \$220 to \$2,191 per violation
 - Aggravating circumstances may increase fine to exceed \$2,191 per violation
 - Large percentage of errors
 - Multiple knowing violations
 - Repeat offenses

Form I-9 Audit and Inspection Updates

- Fines for knowing violations
 - Range from \$548 to \$21,916 per violation (meaning per employee)
 - Repeat offenders or egregious violations will receive harsher fines

Form I-9 Audit and Inspection Updates

- Substantial compliance
 - Affirmative defense
 - The following elements must be proven:
 - Use of an INS Form I-9
 - Employer's signature in Section 2
 - Employee's signature in Section 1

Form I-9 Audit and Inspection Updates

- Section 1 check mark indicating the employee is either a citizen United States or a lawful permanent resident or an alien authorized to work until specified date, and
- Proper List A or Lists B and C documentation must be provided

Form I-9 Audit and Inspection Updates

- Good Faith Defense – knowing violations only
 - Proof of good faith compliance with the employment verification requirements provides a rebuttable affirmative defense
 - Will not apply to paperwork violations (technical and substantive violations discussed above)
 - Everify provides rebuttable presumption of good faith

Form I-9 Audit and Inspection Updates

- The Eighth Amendment excessive fines clause
 - A fine that is so excessive that it outweighs the gravitational relationship to the offense
 - The question is one of proportionality
 - Argue the five factors

Form I-9 Audit and Inspection Updates

- Other defenses
 - The employee must have received wages or remuneration from the employer to be subject to inspection
 - Procedural issues
 - Pay attention to exact wording on NOI
 - Proper service – should be officer or res agent

Completing and Correcting Form I-9

Section 1. Employee Information and Attestation <i>(Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)</i>				
Last Name (Family Name)		First Name (Given Name)		Other Last Names Used (if any)
Address (Street Number and Name)		Apt. Number	City or Town	State ZIP Code
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number <input type="text"/> <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/>	Employee's E-mail Address		Employee's Telephone Number

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

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

Completing and Correcting Form I-9

I attest, under penalty of perjury, that I am (check one of the following boxes):

<input type="checkbox"/> 1. A citizen of the United States		
<input type="checkbox"/> 2. A noncitizen national of the United States <i>(See instructions)</i>		
<input type="checkbox"/> 3. A lawful permanent resident (Alien Registration Number/USCIS Number): _____		
<input type="checkbox"/> 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy): _____ Some aliens may write "N/A" in the expiration date field. <i>(See instructions)</i>	<div style="border: 1px solid black; padding: 5px; text-align: center;"> <small>QR Code - Section 1 Do Not Write In This Space</small> </div>	
<i>Aliens authorized to work must provide only one of the following document numbers to complete Form I-9: An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.</i>		
1. Alien Registration Number/USCIS Number: _____		
OR		
2. Form I-94 Admission Number: _____		
3. Foreign Passport Number: _____		
Country of Issuance: _____		

Signature of Employee	Today's Date (mm/dd/yyyy)
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Preparer and/or Translator Certification (check one):

I did not use a preparer or translator. A preparer(s) and/or translator(s) assisted the employee in completing Section 1.
(Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator		Today's Date (mm/dd/yyyy)	
Last Name (Family Name)		First Name (Given Name)	
Address (Street Number and Name)	City or Town	State	ZIP Code

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

Completing and Correcting Form I-9

Section 2. Employer or Authorized Representative Review and Verification					
<i>(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")</i>					
Employee Info from Section 1	Last Name (Family Name)	First Name (Given Name)	M.I.	Citizenship/Immigration Status	
List A Identity and Employment Authorization		OR	List B Identity	AND	List C Employment Authorization
Document Title		Document Title		Document Title	
Issuing Authority		Issuing Authority		Issuing Authority	
Document Number		Document Number		Document Number	
Expiration Date (if any)(mm/dd/yyyy)		Expiration Date (if any)(mm/dd/yyyy)		Expiration Date (if any)(mm/dd/yyyy)	
Document Title		Additional Information		QR Code - Sections 2 & 3 Do Not Write In This Space	
Issuing Authority					
Document Number					
Expiration Date (if any)(mm/dd/yyyy)					
Document Title					
Issuing Authority					
Document Number					
Expiration Date (if any)(mm/dd/yyyy)					

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

Completing and Correcting Form I-9

- List A documents – identity and authorization
- Common documents
 - Passport
 - Permanent resident alien card
 - Employment authorization card

Completing and Correcting Form I-9

- List B documents – establishes identity only
 - Driver license
 - State identification card
 - Voter identification card
 - School identification card

Completing and Correcting Form I-9

- List C documents – establishes employment authorization only
 - Social security card
 - Birth certificate

Completing and Correcting Form I-9

- Use your judgment when reviewing employee documentation
 - If it appears genuine, then leave it alone
 - If it appears fraudulent or you have suspicions, you must dig deeper or reject applicant

Completing and Correcting Form I-9

(2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): _____ (See instructions for exemptions)

Signature of Employer or Authorized Representative		Today's Date (mm/dd/yyyy)	Title of Employer or Authorized Representative	
Last Name of Employer or Authorized Representative		First Name of Employer or Authorized Representative		Employer's Business or Organization Name
Employer's Business or Organization Address (Street Number and Name)		City or Town	State	ZIP Code

Section 3. Reverification and Rehires (To be completed and signed by employer or authorized representative.)

A. New Name (if applicable)			B. Date of Rehire (if applicable)
Last Name (Family Name)	First Name (Given Name)	Middle Initial	Date (mm/dd/yyyy)

C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title	Document Number	Expiration Date (if any) (mm/dd/yyyy)
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I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Today's Date (mm/dd/yyyy)	Name of Employer or Authorized Representative
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Graphic courtesy of U.S. Immigration and Customs Enforcement www.ice.gov

Completing and Correcting Form I-9

- Seasonal employees
 - Continuing expectation of employment = do not reverify
 - No continuing expectation of employment:
 - Use Section 3 if employee returns within 3 years
 - If more than 3 years, you must use new Form I-9

Completing and Correcting Form I-9

- Tips for correcting Form I-9
 - Only employee may correct Section 1
 - Use a different color pen and initial all changes
 - Use a new Form I-9 if necessary
 - Do not destroy old I-9 forms
 - Do not back date I-9 forms
 - Prepare letter to file for uncorrectable errors

Completing and Correcting Form I-9

- Form I-9 retention requirements
 - Employer may destroy former employee I-9s three years after date of hire or one year post-termination, whichever is longer
 - Form I-9s outside of this scope are not subject to inspection and should be destroyed

Everify and Form I-9

- Everify basics
 - 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.
 - Everify is not mandatory in Michigan (Everify is mandatory in certain states).
 - Everify is not a substitute for Form I-9. Rather, it is a safeguard that will provide a presumption of innocence to a knowing violation.

Everify and Form I-9

- Everify results and employer options
 - Result is “Employment Authorized”
 - Means that the Form I-9 information matches Department of Homeland Security (“DHS”) and Social Security Administration (“SSA”) Records.
 - Result is “Tentative Nonconfirmation”
 - Means that the Form I-9 information does not match DHS or SSA records.

Everify and Form I-9

- Employer options if result is “Tentative Noninformation”
 - 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.
 - If the employee does not contest the result, then the employer may terminate the employee.

Merger and Acquisition

- Two Options
 - 1) Treat employee as a “new hire”
 - 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.

Merger and Acquisition

- 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.
- The employee must complete Section 1 no later than the first day of employment
- The employer or the authorized representative must complete Section 2 within 3 business days of the employee's first day of employment.

Merger and Acquisition

- 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”
- Employers may treat the employee as continuing in employment, in which case, employers must obtain and maintain the previously completed Form I-9.

Merger and Acquisition

- **Buyer Beware** - Employers who choose to keep the previously completed Form I-9 **accept responsibility** for any errors or omissions on those forms.
- **Caution** - Employers should review each Form I-9 with the employee and update or reverify the employee's information, as necessary.

What Are We Seeing?

- Significant increase in ICE inspections since January 1, 2018.
- Large and small scale inspections – companies with 15 employees to several thousand employees.
- Significant and excessive fines issued by ICE after an inspection is performed.
- A substantial delay in responses from ICE after a fine is challenged.

What Are We Seeing?

- ICE will negotiate if the fine is properly challenged.
- ICE's inspection results often include errors or leave the door open for appeal.
- ICE looks favorably upon companies that are proactive about Form I-9 compliance. It is imperative to conduct annual internal from I-9 audits.
- As always, contact counsel for assistance at any stage of the process – hiring practices, internal audits, inspections, and appealing fines