

I-9 audits on the rise: What employers can expect from ICE inspectors

U.S. Immigration and Customs Enforcement is ramping up its efforts to ensure everyone who works in the United States is authorized to do so. Audits of employers' I-9 records are ICE's primary compliance tool.

THE LAW The Immigration Reform and Control Act of 1986 requires employers to have each new employee complete an I-9 form documenting the employee's eligibility to legally work in the United States. The I-9, which asks for various forms of identification, must be completed on the employee's first day of work.

Employers also have the option of using the [online E-Verify system](#), which checks employee identity information against government data to find inconsistencies or cases where multiple people have used the same identification.

WHAT'S NEW ICE's Homeland Security Investigations unit has sent out more than 5,200 Notices of Inspection—NOIs for short—to employers across the country. HSI is issuing NOIs at a rate of more than 8,000 per year. Already, 2018 figures have smashed the previous record high of around 3,100 in 2013.

In federal fiscal year 2017, employers paid \$7.8 million in civil fines and \$97.6 million in judicial forfeitures, fines and restitution. In the largest employer immigration case ever, ICE assessed Pennsylvania-based Asplundh Tree Experts \$95 million.

HOW TO COMPLY Receipt of a NOI marks the first step in an I-9 audit. As soon as an employer receives a NOI it should contact an attorney familiar with I-9 audits. Employers have just three days to produce I-9 forms for all employees. The attorney may be able to negotiate an extension or reduce the number of documents required.

Before an NOI arrives, employers should have already run an internal I-9 audit, with the assistance of an attorney who specializes in immigration worksite investigations. Attorneys that handle immigration issues such as visas may not have the expertise needed to handle an I-9 audit.

Specifically, the attorney handling the audit should know exactly what ICE will want to see on the I-9 documents and what the conventions are for a full-blown I-9 audit.

Note: Don't rely on the E-Verify system to guarantee you will emerge from an I-9 audit unscathed. E-Verify verifies the documents the employee produces to prove he or she can work in the U.S. legally. However, the I-9 form may still contain errors even if the supporting documents are verified.

The I-9 audit process

Once an employer receives the NOI, it means ICE agents may arrive in as few as three days. The agents will inspect the I-9 forms and supporting documents for errors and accuracy.

ICE will also often request a copy of the payroll, list of current employees, articles of incorporation and business licenses. Employers should plan to have these documents available to speed the process.

Once the audit is completed, ICE will notify the employers of the results. The following are the most common notices:

Notice of Inspection Results. Also known as a “compliance letter,” it notifies an employer that it was found to be in compliance.

Notice of Suspect Documents. It advises the employer that, based on a review of the I-9 Form and documentation submitted by the employee, ICE has determined that an employee is unauthorized to work. The notice 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.

Notice of Discrepancies. This notice advises the employer that, based on a review of the I-9 Form and documentation submitted by the employee, ICE has been unable to determine work eligibility. The employer should give the employee a copy of the notice and provide an opportunity to show ICE additional documentation to establish their employment eligibility.

Notice of Technical or Procedural Failures. This notice identifies technical violations identified during the inspection and gives the employer 10 business days to correct the forms. After 10 business days, uncorrected technical and procedural failures will become substantive violations.

Warning Notice. These are 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.

Notice of Intent to Fine. A NIF notice may be issued for substantive, uncorrected technical, knowingly-hire and continuing-to-employ violations.

When an employer receives a NIF, it has the option to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer within 30 days.

If the employer takes no action after receiving a NIF, ICE will issue a Final Order. An administrative law judge will conduct a hearing should the employer request one.