

Organizing I-9 documents: Keeping your employee paperwork compliant and secure

Immigration and Customs Enforcement (ICE) recently sent out more than 3,000 Notices of Inspection (NOI) to employers. The NOI states that agents from ICE's Homeland Security Investigations unit (HSI) will arrive in three days. The agents are checking to ensure the target employer's I-9 documents are compliant.

Employers not found to be in compliance face penalties ranging from minor warnings to jail time. The Trump administration has made illegal immigration a major political issue. Targeting employers has proved far more efficient than knocking on doors to find undocumented immigrants.

Enforcement efforts have focused on specific industries that tend to employ immigrants. Employers in the restaurant, food processing, agriculture or high-tech manufacturing industries are the most likely to be targeted. In a targeted industry or not, now is a good time to ensure all I-9 documentation is in order.

Internal audit before the NOI arrives

As soon as an employer receives an NOI it should contact an attorney familiar with I-9 audits. The attorney may be able to negotiate an extension for the employer or may be able to reduce the number of documents required. But don't wait for a notice.

Before an NOI arrives, employers should have already run an internal I-9 audit. The same attorney the employer would call when it receives the NOI should oversee the internal audit. Ideally, an attorney who specializes in immigration worksite investigations should look over the I-9 forms. Attorneys that handle immigration issues such as visas may or 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.

I-9 document basics

The Immigration Reform and Control Act of 1986 (IRCA) requires employers to have each new employee complete an I-9 form documenting the employee's status to legally work in the United States. The paper version of the Federal I-9 form is available at https://www.uscis.gov/system/files_force/files/form/i-9-paper-version.pdf. New hires must complete these the day they begin work. Employers do not mail the completed forms to ICE. They may be kept in paper form or electronically but must be available to ICE agents should they arrive.

Employers may also use the online smart form at <https://www.uscis.gov/i-9>. There is also a Spanish version, but you can only use it in Puerto Rico. While not totally electronic, the form contains many interactive elements. For example, it responds when the employee chooses either citizen, lawful permanent resident, or alien authorized to work by altering the remaining questions to fit the chosen option. In cases where more than one translator or preparer assists the employee, the form will ask how many, and provide the necessary number of forms. No field may be left blank, the employee must write or choose n/a for those fields. Employers who print out forms must bear this in mind.

Because the form is not totally electronic, the employer's representative and employee must physically sign the printed document. Some companies who specialize in handling I-9 forms may have the proper electronic signature capability, but most employers do not. Once printed out, employers may scan the forms for electronic storage.

ICE is serious about I-9 documentation

Employers who view I-9 forms as a "paper pushing" exercise are in for a rude awakening. ICE takes I-9 enforcement very seriously. IRCA is clear that employers are responsible for reviewing I-9 documentation for accuracy. In fact, an employer representative must sign the form acknowledging that all documentation was examined. Employers who knowingly hire a person not legally permitted to work face fines ranging from \$375 to \$16,000. Failing to produce an I-9 is deemed a substantive violation earning the employer a fine of \$110 and \$1,100 per missing form.

Employers must retain all I-9 documentation for three years after hire or one year after termination, whichever is later.

Updating I-9 documents

Employers never need to re-verify work authorization for US citizens and permanent residents even when documents expire. Employees on work visas may need to be reverified. Employers must review visa-holders' files to determine if their I-9 documents expired. Complete rules for reverification are available at <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires>.

Special rules apply to employees affected by the Deferred Action on Childhood Arrivals (DACA), also known as "dreamers." The Trump Administration's efforts to stop extending DACA protections to these employees was enjoined in federal court. U.S. Citizen and Immigration Services (USCIS) is complying by allowing dreamers to reapply for deferred action for the time being. Because these workers applied at various times, employers should track the expiration dates and urge timely renewals. Dreamers whose permits have not been renewed are not permitted to work. Employers can receive DACA updates at <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

The I-9 Audit Process

Once an employer receives the NOI, it means ICE agents will arrive in three days or longer if other arrangements have been made. 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 items readily available to speed the process.

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.
- **Notice of Suspect Documents** – 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 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.
- **Notice of Discrepancies** – 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 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.

- **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.
- **Notice of Intent to Fine (NIF)** – may be issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations.

When an employer receives an 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 (OCAHO) 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.

But I use E-verify!

E-verify is an online system used to match the documents a new hire provides with government records. Specifically, the program looks at Department of Homeland Security (DHS) and Social Security Administration (SSA) records. Usually, the system provides verification that the I-9 documents presented match government records. If E-verify identifies a problem, the employee has the right to contest those findings.

Employees can also check their status first by going to myeverify.gov. There they can also “lock” their social security number so the system will not permit others to use it.

Some states mandate the use of E-verify by private employers. Federal contractors and subcontractors are required to use the system. Any private employer may voluntarily use E-verify, but should not use it as a screening tool for hiring. Doing so would violate the Immigration Reform and Control Act of 1986 (IRCA).

The federal government’s E-verify system provides employers with some cover but does not guarantee an employer will emerge from an I-9 audit unscathed. E-verify verifies the documents the employee produces show someone can work in the U.S. legally. The employee you hired may not be that employee, however. Plus, the I-9 form may still contain errors even if the supporting documents are verified.