

Practical Advice

From the Immigration & Employment Law Practice

Form I-9 – The Time Is Now for a Proactive Audit

Governmental workplace inspections are on the rise. That means Immigration and Customs Enforcement (ICE) inspections (audits) and raids on employers are likely to continue, especially in target industries such as hospitality, construction, agriculture, tech and manufacturing. Employers seeking to minimize their exposure to potentially massive fines and possible criminal prosecution, must have this issue on their radar.

We recommend that all companies add the cost of a private I-9 audit to their budget planning for 2019. The best way to protect yourself from fines imposed by an inspection is by conducting a private internal audit of your records, before ICE shows up.

Under federal law, all employers in the U.S. are required to complete the I-9 in order to verify the identity and employment eligibility of new hires. Employers are required to have a completed I-9 on file for every current employee (and also to retain them for certain terminated employees).

Employees must complete Section 1 of the I-9 by the first day of employment (and never before acceptance of a job offer).

Employers must complete Section 2 within three business days of the first date of employment. I-9s for current employees must be retained on file and I-9s for terminated employees must be retained for three years from the date of hire, or one year from the date employment ends, whichever is later. Failure to abide by these rules can lead to severe penalties and fines.

When ICE wants to examine your workforce, it provides a Notice of Inspection (NOI) that gives you just three days to get your I-9s and payroll records ready for review. Once that happens, it is very hard, if not impossible, to fix any problems you may have. Besides the fact that there just wouldn't be enough time, ICE has the authority to prevent you from making any

changes and to disregard any remediation efforts after the service of the NOI.

Think your records are in good shape? In our experience, more than half the clients we audit usually have problems with their I-9s, including:

- **INCOMPLETE** - information, signatures, and dates missing.
- **INCORRECT** - information such as a document for List B or C in the List A column.
- **SIGNATURES** - missing or that don't match the names on the documents.
- **BLANK** - Section 2, with the List A or B and C documents simply attached.
- **DOCUMENTS** - that don't match the names on the form.
- **INCORRECT VERSION** - of the Form I-9 used

And on and on and on...

It is common to see the same mistake(s) repeated across hundreds or even thousands of I-9s, which means the potential for significant fines. Fines are assessed on a per I-9 basis, which means you're taking a risk, and these days, it's a big risk. The I-9 may look like a simple form, but in reality, it is not. Mistakes can result in significant fines and even possible criminal prosecution for employers!

If the person completing your new hire paperwork isn't skilled or trained on I-9 to current standards, chances are your records are imperfect.

It is possible to review and remediate your records. However, you can't just ask specific employees to reverify their status, because that can lead to claims of discrimination. Remember, national origin and citizenship status are protected categories.



The best way to fix I-9s is to privately audit all of them, repair all of the mistakes as permitted, and do it before an NOI is issued by a government agency.

““Employers may be subject to criminal prosecution – and yes, that means possible jail time.”

We strongly recommend that you do not audit without the protection of attorney-client privilege. The last thing you want are unprotected emails describing how your I-9s are deficient or that your employees are illegal. This could provide evidence that you knew about the violations and didn't fix them, which can get you into even more trouble. Knowingly employing, hiring or continuing to employ undocumented workers subjects employers to higher fines and may rise to the level of a crime.

Employers are subject to criminal prosecution – and yes, that means possible jail time.

What can employers do proactively to mitigate civil penalties and exposure to criminal prosecution?

- **Job #1! Work with counsel to conduct a proactive internal audit. Doing so before ICE arrives with a NOI is the most effective way to mitigate fines.**
- Ensure your HR representative(s) responsible for completing and maintaining I-9s is well trained and savvy as to what they legally can and cannot say to employees during the verification process. Simply asking an employee to present a specific document in the course of completing the I-9 is unlawful.
- Conduct regular training for HR personnel and team leaders/managers who interact with employees as to the dos and don'ts of communicating with employees.
- Establish immigration compliance I-9 and/or E-Verify standard operating procedures – also used to show good faith compliance and a factor for mitigating fines.

- If storing I-9s electronically, check with counsel to ensure you are storing them properly and in a way that is not further exposing the company to additional violations.
- Streamline your company's I-9 process to minimize room for error in delinquent completion of the I-9 or mistakes on dates of hire.
- Establish a “tickler” calendar reminder system to handle reverification for those employees with work authorization documents containing an expiration date. Remember, the burden is on the employer to ensure its employees are work authorized during the entire period of employment.
- Act sensibly: employers should not be overzealous in their employment verification practices as this too may lead to claims of discrimination and/or retaliation.

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