

Increased Immigration Enforcement: Beware and Prepare for I-9 Audits

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On January 20, 2025, on his first day in office, President Trump issued several sweeping executive orders intended to advance his immigration agenda. These measures will undoubtedly lead to an increase in immigration enforcement operations within the United States. With the return of more aggressive immigration policies, employers can expect an increase in Form I-9, Employment Eligibility Verification ("I-9") audits by the U.S. Immigration and Customs Enforcement ("ICE"). Failure to comply with I-9 laws can have severe consequences including hefty civil fines and even criminal penalties. This article provides an overview of the ICE I-9 audit process and recommended steps for employers to take to prepare for a potential audit.

What is an I-9?

The Immigration Reform and Control Act of 1986 ("IRCA") requires U.S. employers to verify the identity and employment authorization status of ALL new employees. This is done through a Form I-9, which all U.S. employers are required to complete for **every** individual they hire for employment in the United States, including U.S. citizens and noncitizens. 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. 8 C.F.R. The I-9 is the vehicle for documenting this verification.

Employers are required to keep copies of the Form I-9, Employment Eligibility Verification Form, for each employee for three years after the date of hire, or one year after the date employment ends, whichever is later. An employer can never dispose of a current employee's I-9.

Employers are also required to retain documents summarizing internal business processes for I-9 compliance, including procedures for creating and retaining the I-9. The regulations do not require employers to maintain copies of the supporting documents, except for in two situations. First, if the employer as a matter of practice, makes copies of employees' I-9 supporting identity and employment verification documents, then the employer must also retain copies of those records together with the I-9. Second, if the employer uses E-Verify and/or participates in Remote Document Examination, then the employer is required to maintain a clear and legible copy of all I-9 supporting documentation.

What is an I-9 Audit?

Although several government agencies are responsible for enforcing federal immigration laws, ICE is the primary agency effecting employers. ICE, which is a part of the Department of Homeland Security, is comprised of two main entities, Enforcement and Removal Operations ("ERO") and

Homeland Security Investigations (“HSI”). ERO is generally responsible for the apprehension, detention, and deportation of undocumented immigrants. Meanwhile, HSI is generally responsible for investigating transnational crime and historically, this has included investigations into employers hiring undocumented immigrants and I-9 audits.

An I-9 Audit is where ICE, typically HSI, conducts an investigation and audit of the company’s I-9s for each of the company’s employees to determine if the company has complied with the rules for verifying employees’ identities and authorization to work in the United States. ICE initiates an audit by service of a **Notice of Inspection (“NOI”)** requesting production of I-9 and related documents for inspection by ICE. The law requires **ICE provide at least three business days’ notice prior to conducting the Form I-9 Audit.**

After completing its inspection of an employer’s I-9s and any related supporting documentation, ICE will notify the employer of its findings in writing by issuing one of the following notices:

- **Notice of Inspection Results (a/k/a “Compliance Letter”):** used to notify a business that it complies with applicable employee eligibility verification requirements.
- **Notice of Suspect Documents:** Advises the employer that ICE has determined that the documentation presented by employee(s) do not relate to the employee(s) or are otherwise not valid for employment. This notice also advises the employer of the possible criminal and civil penalties for continuing to employ unauthorized workers. ICE provides the employer and employee(s) an opportunity to provide documentation demonstrating valid U.S. work authorization if they believe the finding is in error.
- **Notice of Discrepancies:** Advises the employer that ICE has been unable to determine the employees’ eligibility to work in the U.S., and that the employer should provide the employee(s) with a copy of the notice, as well as an opportunity to present ICE with additional documentation establishing valid U.S. work authorization.
- **Notice of Technical or Procedural Failures:** Identifies technical or procedural failures found during the I-9 inspection and gives the employer at least ten business days to correct the forms. After this correction period ends, uncorrected technical or procedural failures will become substantive violations.
- **Warning Notice:** Issued when substantive verification violations were identified, but there is an expectation of future compliance by the employer. ICE will not issue a warning if (1) the employer was previously issued a Warning Notice or a Notice of Intent to Fine; (2) the employer was notified of technical or procedural failures and failed to timely correct them; (3) the employer had a 100% failure to prepare and present Form(s) I-9; (4) the employer hired unauthorized workers as a result of substantive violations; or, (5) there is any evidence of fraud in the completion of the I-9 (e.g., backdating) on the part of the employer.
- **Notice of Intent to Fine (“NIF”):** May be issued for substantive violations, uncorrected technical or procedural failures, knowingly hire violations, and/or continuing to employ violations. If a NIF is served, ICE will also issue charging documents specifying the alleged violations committed.

An employer is entitled to request a hearing before an Administrative Law Judge at the Office of the Chief Administrative Hearing Officer (“OCAHO”); the request must be submitted within 30 calendar days of receipt of the NIF. *See* 5 U.S.C. §§ 554-557. If a written request for a hearing is not timely

received, ICE will issue a Final Order. **There is no appeal from a Final Order.** If a written request for a hearing is timely received, the employer may request to engage in settlement negotiations with ICE regarding the charges or fine(s) imposed prior to a hearing before OCAHO. If the employer and ICE reach an agreement, ICE will not file a complaint with OCAHO. However, if the employer and ICE do not reach an agreement, ICE will file a complaint with OCAHO.

If you are served with an I-9 NOI, immediately contact an attorney, as you will have only three business days to respond. Kelley Drye's immigration attorneys are extremely experienced and ready to help. In consultation with your legal representatives, review the I-9 documents requested, and as needed, allow employees to have coworkers or union representatives present when discussing I-9 audit documents.

Severe Consequences for Compliance Violations

Failure to comply with I-9 requirements can have severe consequences for employers, including civil and even criminal penalties. For example, employers who fail to properly complete and retain the I-9 or commit simple I-9 paperwork violations, can face civil penalties ranging from \$281 - \$2,789 for each incorrect I-9. [8 CFR 274a.10\(b\)\(2\)](#). Additionally, employers who hire individuals who are not authorized to work in the United States could incur civil penalties in the amount of \$698-\$5,579 for each occurrence. 8 CFR 274a.10(b)(1)(ii)(A). In 2022, OCAHO issued one of the largest I-9 penalty decisions, ordering a staffing company with over 2,000 Form I-9 violations to pay penalties of \$1,527,308. The amount of the fine depends upon the size of the business, good faith of the employer and whether the conduct was intentional, seriousness of the violation, involvement of unauthorized workers, and the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5) and 8 C.F.R. § 274a.10.

Proactive Steps Your Company Can Take to Prepare for a Potential I-9 Audit or ICE Workplace Visit

Don't wait until it is too late! Your business should be prepared for and know how to respond to a NOI and, if applicable, a workplace visit from ICE. Here are some crucial steps employers should take to prepare:

- **Designate a POC** to be responsible for ensuring compliance with Form I-9 requirements. This is likely a human resource professional.
- **Establish written policies and procedures** for complying with I-9 laws and regulations. The policies should at a minimum include the following compliance requirements:
 - I-9 is required for **all** new employees, **no later than the first day** of employment.
 - Keep I-9 forms on file for at least 3 years after hiring or 1 year after the worker's last day of work, *whichever is later*.
 - Do not ask a worker to fill out an I-9 more than once unless it is for reverification purposes, such as the employee's work authorization is about to expire.
- **Conduct annual internal company I-9 audits** to ensure continued compliance with rules and regulations. Preferably, the audit is conducted by an outside third party.
- **Develop an ICE Worksite Visit Response Protocol** which establishes protocols for what to do if ICE visits the workplace. This includes designating employer representatives to

communicate with ICE, marking areas of the workplace as private employees only areas, and providing “Know Your Rights” training to employees and staff.

Kelley Drye has helped many clients with implementing preparatory measures, including but not limited to completing internal I-9 audits, preparing written I-9 policies and ICE worksite visit response protocols, and providing Know Your Rights trainings. These proactive measures will significantly mitigate risk of liability from an I-9 audit.