



Texas Association for
Home Care & Hospice
Leading ★ Advancing ★ Advocating

57th Annual Meeting
Thursday, September 3, 2026
Crockett AB Room
2:45pm-3:45pm

6c. 2026 Employment Law Update for Home Care Employers

Presented by:

Joshua Vaughn, Esq., Littler Mendelson, P.C.

Thank you to our Partners:



A LITTLER PRESENTATION

Compliance Is Care – 2026 Employment Law Update for Texas Home Care Employers

September 3, 2026

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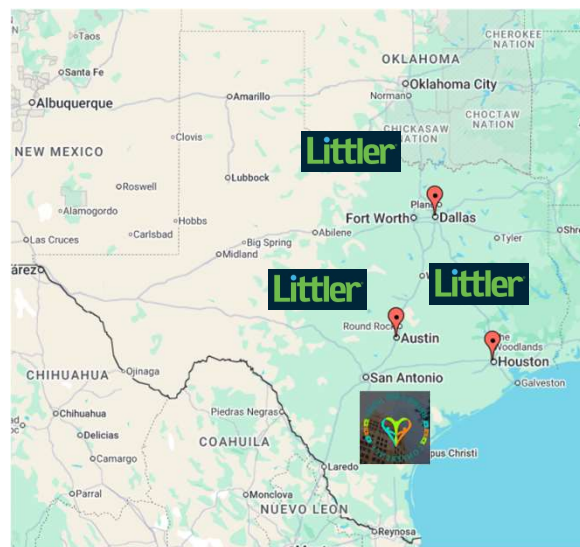
Littler's 45+ Home Care Attorneys (1,300 in US!)



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Littler's Texas Offices & 96 Attorneys



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Agenda

1. US DOL's Proposed Companionship & Live-In Exemption Regulations Update
2. Home Care Wage and Hour
Mistakes + **Pro Tips To Fix them!**
3. I-9 and TPS Terminations Update + Common I-9 Mistakes

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We strongly encourage you to consult legal counsel of your choice on specific matters involving employment law, and important personnel policies and practices prior to adoption or implementation.

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Submit Questions!

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**US DOL's Proposed
Companionship &
Live-In Exemption
Regulations**



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Current Law



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Current Regulation (29 C.F.R. §552.109) Excludes Third-Party Employers from Classifying as Exempt

§ 552.109 Third party employment.

- (a) Third party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption, if the employee meets all of the requirements of § 552.6.

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Future Law?



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On July 2, 2025 U.S. DOL Proposed Regulations . . .

**FEDERAL REGISTER**
The Daily Journal of the United States Government

Proposed Rule

Application of the Fair Labor Standards Act to Domestic Service

A Proposed Rule by the Wage and Hour Division on 07/02/2025

This document has a comment period that ends in 43 days. (09/02/2025)

SUBMIT A PUBLIC COMMENT

44 comments received. View posted comments

PDF

Document Details

Document Dates

Table of Contents

Public Comments

Regulations.gov Data

Sharing

PUBLISHED DOCUMENT: 2025-12316 (90 FR 28975)

DOCUMENT HEADINGS

Department of Labor
Wage and Hour Division
29 CFR Part 552
RIN 1235-AA51

AGENCY:

Wage and Hour Division, Department of Labor.

ACTION:

Proposed rule; request for comments.

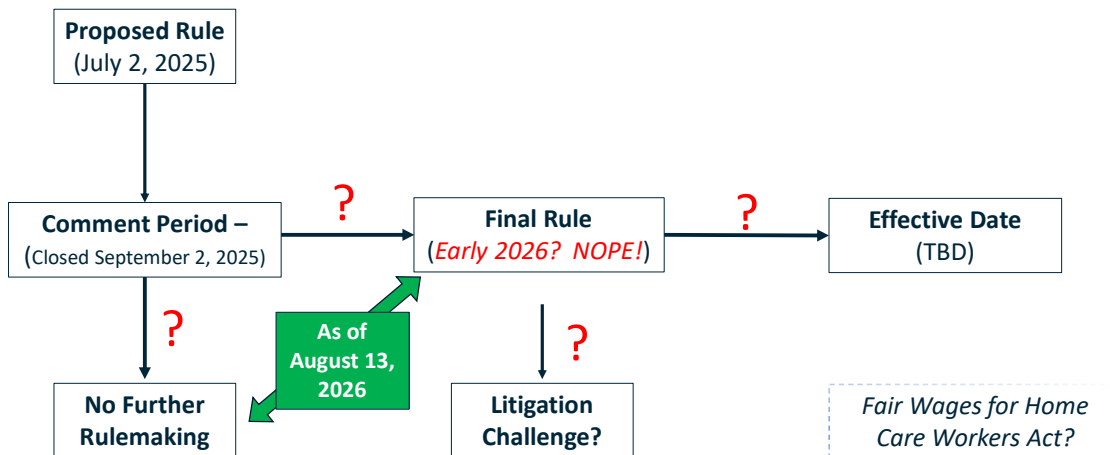
SUMMARY:

In 1974, Congress applied the Fair Labor Standards Act (FLSA) to "domestic service" employees, but exempted employees who provide "companionship services" from the minimum wage and overtime

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So What Happens Next?



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NEW - Fair Wages for Home Care Workers Act?

- On March 12, 2026, Sens. Patty Murray (D-WA), Andy Kim (D-NJ), and Rep. Alexandria Ocasio-Cortez (D-NY) (in addition to their co-signers) **introduced legislation** that would **statutorily mandate minimum wage and overtime pay** for home care workers and domestic workers.
- The legislation is a direct response to the DOL's proposed companionship and live-in exemption regulations.

So What Does This Mean?!?

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So What Should You Do Now If You Are A **GREEN** State?

Should you change practices immediately to get ahead of your competition?



**In the Words of the late great Dikembe Mutombo,
No, No, No!**

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What Is A *Safe Bet* To Do Now If You Are A **GREEN** State?

- ~~1. COMMENT!! (CURRENTLY DUE BY SEPT 2)~~
2. Evaluate compensation models
3. Create Conversion Plan

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GREEN State - Evaluating Compensation Models/Options

- Will classifying as exempt improve or hurt recruiting? Retention?
- Will eliminating OT costs change rates charged to clients?
- Will eliminating OT decrease recordkeeping obligations?
- Will law change again in near future?

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GREEN State – Consider Creating A Conversion Plan

- Target date
 - Payroll
 - Revise Timekeeping policy?
 - Revise Job Description?
 - Revise Job posting?
 - Communication plan to managers/supervisors/office team + FAQs
 - Communication plan to impacted caregivers + FAQs
 - Communication plan to clients + FAQs
- Review payroll after change to ensure correct

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Littler Conversion Package (IF Rule finalized)

1. Timeline + Action Steps Summary
2. Revised Timekeeping Policy
3. Template Communication + FAQs for managers/supervisors/office
4. Template Communication + FAQs for impacted caregivers
5. Template Communication + FAQs for clients

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So What Do We Recommend Doing In All States?



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Last Name *

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- ☐ Pay Equity Compliance
- ☐ Privacy and Data Security
- ☐ Unfair Competition and Trade Seci
- ☐ Wage and Hour
- ☐ Whistleblowing, Compliance and Investigations
- ☐ Workers' Compensation
- ☐ Workplace Training
- ☐ Workplace Violence Prevention and Crisis Response

+ Industries

- ☐ Construction
- ☐ Emerging Companies and Venture Capital
- ☐ Energy
- ☐ Financial Services
- ☐ Healthcare

+ States/Territories

- ☐ Healthcare - Home Care
- ☐ Higher Education
- ☐ Hospitality
- ☐ Retail
- ☐ Sports
- ☐ Transportation

+ Industries

+ States/Territories

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Wage and Hour *Mistakes* in Home Care + *Pro Tips To Fix*



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Costs of Litigation = Money + Time + Reputation

	Single Plaintiff Lawsuit	Class/Collective Action Lawsuit
MTD	\$25,000 - \$50,000+	\$35,000 - \$75,000+
Discovery / MSJ	\$75,000 - 200,000+	\$150,000 - 500,000+
Trial	\$150,000 - \$350,000+	\$350,000 - \$1,500,000+
Appeals	\$35,000 - \$65,000+	\$65,000 - \$105,000+

*What is your and your team's time worth over years of litigation?
And what about the potential costs if you lose?*

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Most Common Wage and Hour Mistakes and Violations (actual DOL Audits)

- ✓ **Failure to Pay for Travel**
- ✓ **No Live-In Agreement or Day Rates w/no OT**
- ✓ **Failure to Correctly Calculate and Pay Overtime Rates**
- ✓ **Failure to Properly Pay On-Call Shifts**
- ✓ **Misclassified Employees (e.g. classifying all office employees as exempt regardless of duties)**
- ✓ **Off the Clock work**

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Travel Time? That's All Just Non-Compensable Commuting, Right?



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Non-Exempt Employee Traps Travel Time Under FLSA

Compensable

- Travel between job/client sites during the workday
- Travel to another city for special one-day assignments (minus normal commute time)
- Overnight travel during the Team Member's normal work hours (on a work or non-workday)

Not Compensable

- Normal home-to-work commuting, unless Team Member begins work prior to commuting
- Overnight travel as a passenger, if outside the Team Member's normal work hours (on a work or non-workday)

Remember - Mileage reimbursement is not the same as payment for compensable hours worked!

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FLSA Live-In + 24+ Hour Risks, Requirements, and Best Practices

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US DOL Guidance Regarding FLSA Requirements

- For shifts of *fewer than 24 hours*, **no exclusion** for meals or sleep time
- For shifts *24 hours or longer and live-in shifts*, caregiver and worker **may reach agreement to exclude** from hours worked
 - sleep time,
 - meal time, and
 - other periods of freedom from all duties when the worker leaves the premises or stays on premises for purely personal matters.

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FLSA Rule for Sleep Time For 24+ Hour Shifts

- Sleep time **can be excluded** from “hours worked” if employee is on duty **24 hours or more**, and the employee:
 - **Agrees** (DOL says written required) that up to 8 hours of sleep time will not be paid
 - Sleeping period is **regularly scheduled** (no floating sleep period)
 - Has **adequate sleeping facilities**
 - Is generally able to enjoy an **uninterrupted night of sleep**
 - Is **paid for any interruption** of sleep time
 - Is paid for the entire night if the employee gets less than five hours of uninterrupted sleep
- Similar – though not identical – requirements for live-in shifts

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Day Rates Are Not Unlawful Per Se . . . But We Don't Recommend Them!

§ 778.112 Day rates and job rates.

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if he receives no other form of compensation for services, his regular rate is determined by totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

- Take Away: Day rates **are lawful** (yay!), **BUT** you have to pay OT on top
- What about **pre-calculating** an hourly and OT rate based on a presumed number of hours worked?

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What About Precalculation of Overtime?

Extended Shift (i.e., 24+ Hours) Caregiver is expected to work **16-hour shifts** over a **5-day work week** and be paid **\$10/hour**

- 5 days x 16 hours per shift = 80 hours.
- Straight time pay is $80 \times \$10 = \800 .
- 40 hours of OT premium at \$5 rate = \$200.
- Total pay for the week = \$1000.

Can you divide weekly compensation by the number of days to show a \$200 Day Rate?

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What About Precalculation of Overtime?

- Kind of . . .
 - You can show caregiver the calculation that results in a certain daily rate based on a presumed number of hours worked. BUT . . .
 - Must have a contract that specifies hourly rate
 - Must track hours actually worked
 - Must pay correct hourly and OT rates depending on # of actual hours worked
 - Pay stub should reflect hourly rate x hours worked

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What About Precalculation of Overtime?

- Creates risk Caregiver does not understand (hourly) basis of pay and reports to US DOL investigator or Plaintiff's attorney they are paid day rates.
- Is practically **difficult to administer**.
 - **What if:** CG works a 6th Shift at 16 hours on a Saturday.
 - ❖ Do you Pay an extra \$200?
 - ❖ **NO!** 16 hours x \$15 dollars = \$240 for the additional shift.
 - **What if:** CG takes 3 days off?
 - ❖ Pay \$600 less?
 - ❖ **NO!** 32 hours x \$10 dollars = \$320 for the week.

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Ok, But Does Anyone Actually Get Sued For This?!?

YES!

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, ss

[REDACTED]
Plaintiff
vs.
[REDACTED]
[REDACTED]
[REDACTED]
Defendants

COMPLAINT
Plaintiff [REDACTED] ("Plaintiff" or "[REDACTED]") brings this action against [REDACTED]

CIVIL ACTION NO.

SUPERIOR COURT
TRIAL DEPT.

COPY

11. From the three years preceding the filing of the complaint in this matter through the present, [REDACTED] has provided the live-in homecare services for [REDACTED]'s client 24 hours per day, seven days per week, with the exception of a four hour break she receives on Mondays, Tuesdays, Wednesdays, Fridays, and Saturdays.
12. [REDACTED] and [REDACTED] did not enter into an agreement pursuant to 940 CMR 32.03(2) to exclude sleep time from working time. Even if they had, [REDACTED]'s sleep is regularly interrupted to perform work for [REDACTED]'s client.
13. From the three years preceding the filing of the complaint in this matter through the present, [REDACTED] compensated [REDACTED] at a flat rate per day that has ranged from \$300 per day to \$420 per day.

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Ok, But Does Anyone Actually Get Sued For This?!?

YES!

10. Throughout her employment Plaintiff was paid through a combination of an hourly wage of approximately \$11.43 to \$13.64 per hour and flat non-hourly based payments of approximately \$160.00. However, these payments did not include full overtime premium compensation equal to one and one-half times her regular rate of pay for her hours worked over 40 in a week.

12. Like Plaintiff, Defendant's other Caregivers also regularly worked over 40 hours a week and were paid by Defendant through a combination of hourly and flat non-hourly based payments during the relevant three-year period. Like Plaintiff, Defendant's other Caregivers did not receive full overtime premium compensation equal to one and one-half times their regular rate of pay for their hours worked over 40 in a week.

CLASS ACTION ALLEGATIONS

13. Plaintiff brings this lawsuit as a class action on behalf of herself and all other individuals who, during any week since April 9, 2018, have worked for Defendant as a Caregiver and were not paid full overtime premium compensation for all hours worked over 40 in a week.

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I Pay 1.5x the Base Rate For OT – That's Good Enough, Right?



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Non-Exempt Employee Traps Calculating the Regular and Overtime Rates

- OT just = base rate x 1.5, right? **WRONG!**
- Remember TOTAL REMUNERATION divided by TOTAL HOURS WORKED = Regular Rate
 - Total Remuneration **includes** pay for work + **any incentive bonuses / other non-discretionary pay** earned during the workweek
 - Total Remuneration **excludes** expense reimbursement and discretionary bonuses

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Non-Exempt Employee Traps Calculating the Regular and Overtime Rates

- Examples of pay included in regular rate:
 - Retention bonus
 - Performance bonus
 - On call pay
 - Shift differential
 - Perfect Attendance bonus
- Generally, if the payment is designed to encourage a worker to work harder, longer, more efficiently, etc – it is likely includable.

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Non-Exempt Employee Traps Calculating the Regular and Overtime Rates

- Examples of pay excluded from the regular rate:
 - Expense reimbursements
 - Sign-on Bonus
 - Discretionary bonuses
- Beware, a **disguised** retention bonus (i.e., a sign on bonus the worker only earns if they stay employed for a period of time) is still includable!
- Discretionary bonus: Not pre-announced such that employees count on them, typically one-time, decision whether to award and amount decided shortly before and in sole discretion of company

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Why Do We Care About Wage and Hour Mistakes and Violations?

Let's set up hypothetical #1:

- ✓ ER fails to include retention bonus, performance bonus, shift differential, on call pay, etc in regular and overtime rate calculation for caregivers working > 40 hours/wk
- ✓ Impacts 100 caregivers during last 3 years (potentially longer SOL under certain state's laws)
- ✓ On average, EE was paid \$771/wk and should have been paid \$779.64 – **a WHOPPING \$8.64 more per week?!**

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Why Do We Care About Wage and Hour Mistakes and Violations?

Our Prior Example – No Good Faith

\$779.64 - \$771 = \$8.64 per week
 \$8.64/wk x 156 weeks = \$1,347 per EE
 \$1,347 x 100 EEs = \$134,700 back wages

\$134,700 back wages
\$134,700 liquidated damages
\$269,400 Total

PLUS Civil Money Penalties

Our Prior Example – Good Faith

\$779.64 - \$771 = \$8.64 per week
 \$8.64/wk x 104 weeks = \$898.56 per EE
 \$ 898.56 x 100 EEs = \$89,856 back wages

\$89,856 Total
No liquidated damages
No Civil Money Penalties

This is a 2/3 reduction of potential exposure even before CMPs are considered!!

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A LITTLER PRESENTATION

TPS Update and Common I9 Mistakes

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**BREAKING
NEWS**

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TPS Termination Update - Background

- The U.S. Supreme Court in *Mullins v. Doe* confirmed the Department of Homeland Security's authority **to end the TPS program** for **Haiti, Burma, Somalia, Yemen, Syria, Ethiopia, and South Sudan.**
- The United States Citizenship and Immigration Services (USCIS) has extended the TPS termination date multiple times.
- On August 5, the district court lifted the stay.

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TPS Termination Update So What Does This Mean for Employers?

- It is **unlawful** (as of Aug 5) to employ a worker who is only permitted to work pursuant to one of these TPS programs.
- **Action Steps (NOW!)**
 1. Review your Form I-9 records to determine if any workers only have TPS designation EADs.
 2. Contact any such workers IMMEDIATELY to determine if they have other EADs
 - ✓ If so, you should **complete Supplement B**
 - ✓ If none, **terminate on or before applicable term date**

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Documents that Do Not Show Work Authorization

- Documents that **DO NOT show** continuing work authorization:

- X** EAD with category C11;
- X** Receipt for I-765 application for EAD;
- X** Receipt for I-589 application for asylum;
- X** Receipt for Biometrics notice for I-765 or I-589;
- X** Receipt for I-765 approval.

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Documents that Do Not Show Work Authorization (Cont . . .)

- Documents that **DO NOT show** continuing work authorization:

- X** IRS individual taxpayer number (ITIN)
- X** Restricted Social Security card as List C document – stated not valid for employment unless DHS work authorization;
- X** Expired passport, driver's license, or green card, unless extended by USCIS documentation; and
- X** Foreign passport, unless it has I-551 stamp or is accompanied by Form I-94 which has worker's unexpired nonimmigrant status.

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Risks of Continuing to Roster Unauthorized Workers

- If you continue to roster these workers, ICE could:
 - audit your I-9s
 - find you are “knowingly employing unauthorized workers” and
 - fine you up to \$5,700 per unauthorized employee.

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Reminders For Terminations

- **Final pay** is due in full not later than 6th day after discharge. Tex. Lab. Code § 61.014(a); 28 Tex. Admin. Code § 821.22(b).
- Be sure to follow any company policy regarding **PTO/Vacation** payout so final pay stubs shows a 0 hour balance

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Homeland Security

ICE I-9 Audits

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Notice of Inspection

Office of Investigation
U.S. Department of Homeland Security
[Address]
[Address]



U.S. Immigration and Customs Enforcement

NOTICE OF INSPECTION

[Date]

[Name of Company Official]
[Company Name]
[Company Address]

Dear Sir/Madam:

Section 274A of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, requires employers to hire only United States citizens and aliens who are authorized to work in the United States. Employers must verify employment eligibility of persons hired after November 6, 1986 using the Employment Eligibility Verification Form I-9.

U.S. Immigration and Customs Enforcement (ICE) regulations require the provision of three days notice prior to conducting a review of an employer's Forms I-9. This letter serves as advance notice that ICE has scheduled a review of your forms for insert date and time. You may, however, waive the three-day period, should you wish to do so, by annotating and signing the bottom of this letter and advising this office of your decision.

During the review, insert name and title of ICE point of contact will discuss the requirements of the law with you and inspect your Forms I-9. The purpose of this review is to ensure your compliance with the provisions of the law. ICE will make every effort to conduct the review of records in a timely manner so as not to impede your normal business routine.

Sincerely,

Insert name
Insert title (GS or above)

I wish to waive the three day notice to which I am entitled by regulation.

(Printed Name) _____ (Signature) _____ (Date) _____

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Civil Penalties

- I-9 paperwork for uncorrected technical and substantive violations result in penalty of **\$288 to \$2,861*** for each individual.
- Knowingly hiring violations result in penalty of **\$716 to \$5,724*** per violation for 1st offense.

*ICE penalties will be increasing about 3% in 2026.



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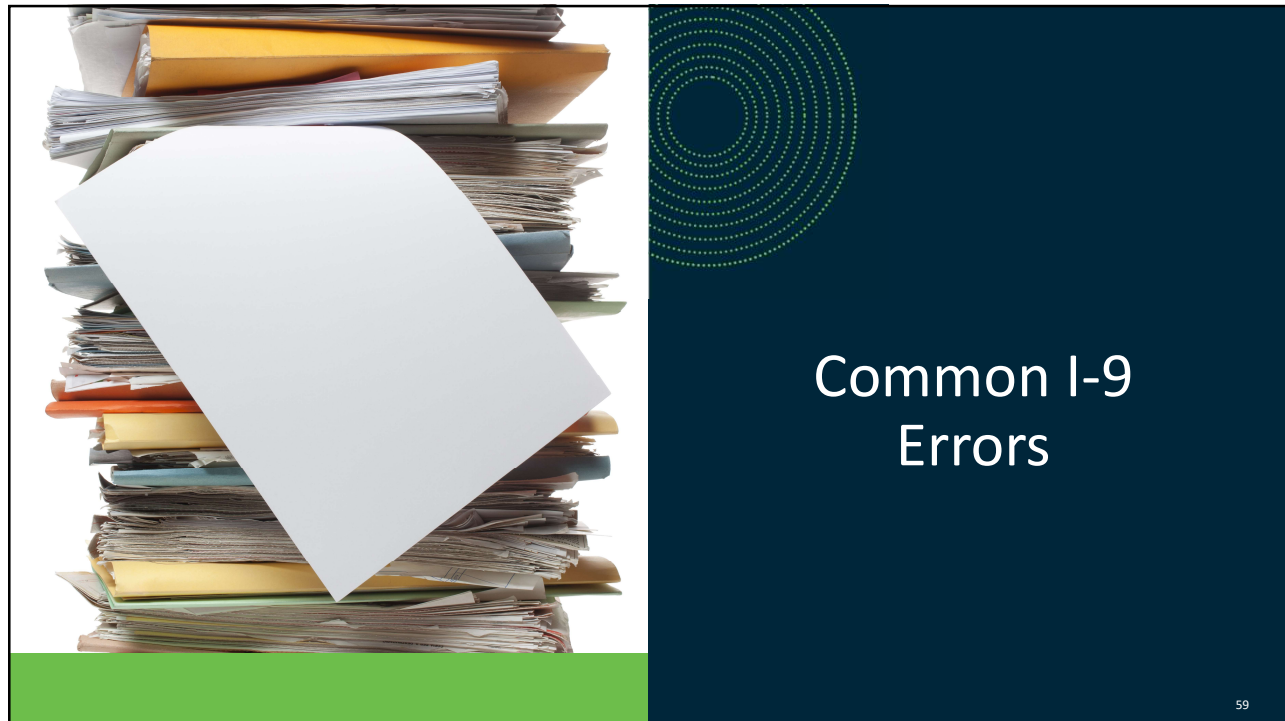
Criminal Penalties

- Criminal penalties for immigration violations:
 - Where ICE finds employer knowingly employed individuals who lack work authorization - *imprisonment for up to 6 months and/or fines*
 - Harbored and/or transported undocumented workers - *up to 5 years in prison for simple harboring*
 - Tax fraud – paying undocumented workers in cash or 1099 worker - *up to 3 years in prison & fine of up to \$100,000*
 - Transporting - *up to five years in federal prison.*

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Common I-9 Errors – Section 1

- Failure to complete an I-9 form w/in 3 days – either through inadvertence or because you are incorrectly engaging worker as 1099 worker;
- Failure to sign I-9 form by employee;
- Failure to check box for citizenship or employment-authorized immigration status and/or record Alien/USCIS #.

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Common I-9 Errors – Section 2

- Failure to complete employer certification in Section 2;
- Failure to sign I-9 form by employer rep;
- Failure to complete Lists A OR B and C;
- Failure to record expiration date, type of document and/or issuing authority missing;
- Failure to sign and/or date within 3 days after 1st day of employment.

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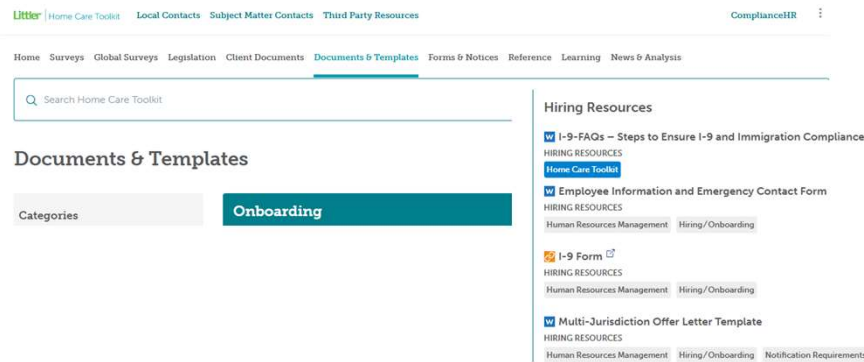
**Littler Resources
&
Your Next Steps
For Compliance**

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Pro Tip – How to Prepare For An ICE I-9 Audit

- **Internal I-9 audit** – cure errors on I-9 forms & ID and discharge undocumented workers.



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Pro Tip – How to Prepare For An ICE I-9 Audit

- Ensure staff are properly trained on completing / storing I-9 forms.
- Consult ICE website or counsel about any types of ID you are not familiar with.
- Keep copies of documentation accepted as proof of identity & employment authorization with Form I-9.

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Your Next Steps

1. Plan for the knock on your door
 - Identify internal lead team member
 - Educate Team (reception to management to team lead)
 - Know the Attorney to call
2. ICE Training
3. Self Audit I-9 files (Correct Mistakes before ICE serves NOI!)
4. Call Counsel Immediately! *If you wait and try to handle yourself, it could be too late*

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Questions?



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Thank You

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