



**I-9 Employment Eligibility Verification Compliance
Part 2 - U.S. Immigration and Customs Enforcement (ICE)
Worksite Enforcement Guidelines**



Rona M. Lum

Rona M. Lum, P.C.
Attorneys at Law
691 N. Squirrel Rd, Suite 185
Auburn Hills, MI 48326
248.340.1854

rlum@corpimmigration.us
www.corpimmigration.us

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In our newsletter earlier this month, we reviewed the basics of Employment Eligibility Verification compliance and proper completion of the Form I-9. In this issue, we will discuss the guidelines followed by the U.S. Immigration and Customs Enforcement (ICE) in conducting the administrative Form I-9 audit process, as set forth in the "Worksite Enforcement - Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties," dated November 25, 2008.

Who is the U.S. Immigration and Customs Enforcement?

U.S. Immigration and Customs Enforcement (ICE) is the largest investigative agency within the U.S. Department of Homeland Security, and is tasked with protecting national security, public safety and the integrity of the U.S. borders through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration. ICE's Office of Investigations (OI) investigates violations of employment verification laws and visa violations in the U.S. and abroad.

Worksite Enforcement - The Administrative Inspection Process

Worksite Enforcement cases are investigations of businesses suspected of violating the Immigration and Nationality Act (INA). ICE Special Agents may utilize civil and criminal statutes in their enforcement efforts.

The administrative inspection process is initiated by the service of a Notice of Inspection (NOI) upon an employer compelling the production of all Employment Eligibility Verification forms (Form I-9) for current and recently terminated employees. ICE Special Agents then conduct an inspection of the Form I-9s for substantive or technical violations. At the conclusion of their inspection, a finding of compliance, a Warning Notice, or a Notice of Intent to Fine (NIF) may be issued.

In some instances, the administrative inspection process will be an integral part of an overall criminal investigation while in others it may be the sole investigation of the employer. In its internal guidance, ICE makes it very clear that the administrative inspection and fines process is a critical component of their agency's overall national strategy aimed at reducing employment as a motivating factor for illegal immigration and to garner employers' voluntary compliance with U.S. immigration laws.

Notice of Inspection (NOI)

The issuance of the Notice of Inspection (NOI) on any employer is the first step in the administrative inspection process. The inspection of Form I-9 may consist of a review of all forms or a random sampling of forms at the discretion of the ICE Special Agent. Employers are not required to copy documents presented as evidence of identity and employment eligibility; however, if they elect to do so, they should implement a consistent policy for all employees. An employer who treats employees differently based upon national origin, perceived citizenship status or other prohibited characteristics may be found to have engaged in unlawful discrimination or other violations of law.

Three Day Rule

The regulations require ICE to provide an employer with at least three days written notice prior to a Form I-9 inspection. Normally, this notice will include only week days but may include weekends and holidays, if those are normal work days for the business.

ICE may not ask to see an employer's Forms I-9 without first serving the employer with a NOI containing an advisory of the employer's right to three days notice. Upon service of the NOI, a waiver of advance notice is permitted only if the employer requests, without solicitation by the ICE Special Agent, that the three day notice be waived for reasons such as convenience or business operations.

An employer who treats employees differently based upon national origin, perceived citizenship status or other prohibited characteristics may be found to have engaged in unlawful discrimination or other violations of law.

Contents of the NOI

The NOI must contain the name of the business to be inspected, the date and time of the proposed inspection, a waiver of the three day notice, and the time period covered by the inspection. In the NOI, employers will be requested to provide the following information, if applicable:

1. Forms I-9 of all current and terminated employees. Employers are required to retain Form I-9 for a period of three years after the date of hire or one year after the date of termination, whichever is later in time;
2. A list of all current and terminated employees with hire and termination dates;
3. Copies of quarterly wage and hour reports and/or payroll data for all employees (current and terminated) covering the period of the inspection;
4. Quarterly tax statements (IRS Form 941);
5. Business information to include Employer Identification Number, Taxpayer Identification Number, owner's Social Security number, owner address information, telephone numbers, email addresses, copies of Articles of Incorporation (if applicable), copies of business licenses, and any other pertinent information;
6. Copies of any and all correspondence from the Social Security Administration to the employer regarding mismatched or no matched SSNs, commonly referred to as "No Match" letters; and
7. Whether the company is a current or previous participant in E-Verify or the Social Security Number Verification Service.

The applicable regulations only require that the employer provide the Forms I-9 for inspection. If an employer declines to provide additional documentation as requested, the ICE Special Agent may use legal process to compel the production of the information.

Service of the NOI

The NOI must be served in person or by certified U.S. mail, return receipt requested, upon the owner, designee, senior management official, or registered agent of the business entity.

Location of Inspection

ICE may conduct the Form I-9 inspection at the business entity's location, or require that the employer produce the Forms I-9 at the field office of the Office of Investigation. Regulations require that the Forms I-9 must be made available in their original paper, electronic form, a paper copy of the electronic form, or on microfilm or microfiche at the location where the request for production was made.

Identifying Substantive and Technical Verification Violations

ICE Special Agents look to identify any Form I-9 violations that may have been committed by the employer. Verification violations are either technical or substantive; the test of which it might be lies in the seriousness of the error and whether or not it could have led to the hiring of an unauthorized alien.

Technical verification violations include use of the Spanish version of the Form I-9, except in Puerto Rico; failure to ensure that the employee dates Section 1 of the Form I-9 at the time employment begins; failure to provide the date employment begins in Section 2 of Form I-9; and failure to date Section 2 within 3 business days of date employment begins.

Employers are allowed at least ten business days from the date of notice to correct technical violations. If the employer corrects the violations within the designated time, the employer is deemed to have complied with the regulatory requirements. An employer will be issued a Notice of Intent to Fine (NIF) for uncorrected violations unless the uncorrected violations could not reasonably be corrected.

On the other hand, if the inspection process reveals Form I-9 verification failures that are determined to be substantive in nature, a Warning Notice or NIF will be issued to the employer. *Substantive violations* are defined as actions such as hiring an alien knowing that the person is not authorized by law to work in the U.S., continuing to employ an alien knowing that he or she is or has become unauthorized by law to work in the U.S., failure to prepare and present the Form I-9 to a new employee and serious paperwork violations that could have led to the hiring of an unauthorized alien. Backdating a Form I-9 is considered to be fraud and will result in a NIF.

ICE Special Agents are advised to issue Warning Notices in circumstances where substantive verification violations were identified but there is the expectation of future compliance by the employer, with noted exceptions. A NIF will be issued in all other circumstances involving a substantive violation. In calculating the amount of the fine, the Officers first determine a violation percentage. The violation percentage is determined by dividing the number of substantive violations by the total number of Forms I-9 presented for inspection. The violation percentage determines the base fine amount, as applied against a tiered fine schedule. The Officers then apply an enhancement matrix to the specific facts of the case which may increase or decrease the recommended fine by up to 25%.

Word to the Wise

Many technical and substantive violations can be avoided and easily overcome by having the Form I-9 process diligently supervised and monitored by a company's Human Resource Department or a person familiar with the requirements. In the current environment of increased worksite enforcement efforts by ICE and other federal agencies, the Employment Eligibility Verification process must not be taken lightly.

Please contact our law firm for more information on this subject.

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