I-9 and E-Verify®
ESSENTIALS

J. J. Keller & Associates, Inc.®
Since 1953

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Introduction

Each year, thousands of companies become the target of federal Form I-9 audits, and these audits result in millions of dollars in fines for employers. While penalties and sanctions do come from willful violations, many employers don't realize what they are doing wrong with regard to the employment eligibility process. Arming yourself with information is the best way to make sure a federal audit doesn't result in negative publicity and a hefty fine.

The *I-9 and E-Verify Essentials* manual is a complete resource to an organization's employment eligibility responsibilities. It provides comprehensive guidance on the Form I-9, including a thorough explanation of every field and element on the form and information to walk you through a self-audit of existing forms. This resource also contains detailed information on using E-Verify®: from the pros and cons of using the system to the steps an employer must take to avoid discriminatory practices. In addition, this resource contains hundreds of valuable FAQs, detailed information about different types of work authorization documents, and information tailored specifically for federal contractors.

Revision bars, like the one at the left of this paragraph, are used in this publication to show where significant changes were made on update pages. The revision bar next to text on a page indicates that the text was revised. The date at the bottom of the page tells you when the revised page was issued. When found in this publication's table of contents, revision bars may signify that content has changed or may simply indicate that page numbers on which content can be found have changed.

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Audit considerations for employers using electronic storage systems

Individual audits of employers may vary slightly depending on the auditor. However, if audited by Immigrations and Customs Enforcement (ICE), employers that store Forms I-9 electronically will likely be required to:

1. **Produce an audit trail.** An audit trail shows the actions performed with or on the company's Forms I-9 during a given period of time. Any time an electronic I-9 is created, completed, updated, modified, altered, or corrected, the system must create a secure and permanent record that establishes the date accessed, who accessed it, and what action was taken. The audit trail shows all the actions taken for a particular I-9.
2. **Provide the name of the software product being used.** Employers should be ready to explain to ICE how the system works and how it allows the employer to fulfill its legal obligations.
3. **Show ICE the employer's electronic indexing system.** An indexing system would allow the employer (and ICE) to search for particular I-9s using specific identifiers, such as the employee's name or the type of documentation presented.
4. **Produce documentation of the system used to capture the electronic signatures on the Form I-9.** This includes the identity and attestation of the individual electronically signing the Form I-9.
5. **Produce at least one printed Form I-9 that is completely electronically generated.** This allows ICE to ensure that electronically stored forms can be reproduced, as required by the regulations.
6. **Provide access to the electronic I-9 system to ICE for a demonstration of the generation of an electronic Form I-9.** When accessing an employer's system in this way, ICE will be looking to make sure that the integrity of the I-9 process has not been compromised. An electronic I-9 system should not add or move fields, for example, and should not mix the Form I-9 function with other onboarding functions (such as drug screening or background checks).

What to expect after a notice of inspection

Once ICE has reviewed a company's forms, the employer may receive any of the following notices:

- **Notice of inspection results:** Used to notify a business that it was found to be in compliance.
- **Notice of suspect documents:** Advises the employer of ICE's determination that an employee is not authorized to work. The employer and employee will have the opportunity to demonstrate work authorization if they believe the finding is in error.
- **Notice of discrepancies:** Advises the employer that ICE cannot determine the work eligibility of an employee. The employee will have the opportunity to present additional documentation to establish work eligibility.
- **Notice of technical or procedural failures:** Identifies technical (paperwork) violations found during the inspection. Employers have 10 business days to correct these errors or risk the mistakes becoming substantive violations.

At an audit's conclusion, ICE will issue a "notice of intent to fine" for any remaining violations. The employer has 30 days to negotiate a settlement or request an administrative hearing. An employer that does neither will be issued a final order and will be liable for the penalties assessed by ICE.

Who invited the auditor?

There are many different ways an employer could be selected for a Form I-9 audit. Audits are sometimes conducted in response to a tip received by a government agency or a complaint from a current or former employee. Even discrimination claims regarding the way an employer conducts the Form I-9 process could spark a federal audit. A particular round of government audits may also be focused on employers in particular industries.

Some employers believe that they won't be audited if they don't employ undocumented workers. While a report of unauthorized workers may certainly compel an ICE audit, employers that don't hire unauthorized workers can't afford to have a false sense of security. ICE has conducted plenty of audits of businesses whose workers are all authorized to work in the U.S., and the agency has still managed to impose penalties for paperwork deficiencies. Attention to the Form I-9 process is necessary for all employers, no matter what the composition of the workforce.

Employers should also be aware that federal agencies sometimes share information. If a wage and hour audit reveals an employer's noncompliance, that employer shouldn't be surprised if it is selected for an I-9 audit down the road.

Note

Effective January 1, 2018, California employers are prohibited by state law from giving Immigration and Customs Enforcement (ICE) access to nonpublic areas of their worksites or allowing ICE to examine their records without a warrant. Employers must alert employees to any inspections by an immigration agency within 72 hours of receiving notice of an inspection. A template for this purpose is available in both English and Spanish from the state Department of Industrial Relations.

Penalties

Fines for noncompliance can be considerable, though they depend on the nature of the violation. Employers have even been arrested on criminal charges for things like knowingly making false statements on the I-9 or knowingly hiring individuals who are not authorized to work.

Fines and/or penalties can also result when forms are missing, when employers make paperwork errors, when documentation is not properly recorded or temporary work authorization has expired and has not been reverified, or when an employer's electronic storage system does not meet requirements.

Key Court Case

In 2011, Immigration and Customs Enforcement (ICE) audited an event design and production company. Almost 400 of the company's 718 employees were referred by a hiring hall, and upon hire, those employees were presented with a three-in-one form, which included a portion of the W-4 form, parts of Sections 1 and 2 of the Form I-9, and a union dues checkoff authorization. These employees completed all of this form except for Section 2 of the Form I-9. Upon receipt of these forms from the hiring hall, the production company failed to properly complete Section 2 of the I-9.

For all of these employees, ICE charged the company with the failure to sign in Section 2, even though the agency could have considered the I-9 to be completely inadequate, since the hiring hall's modified Form I-9 is not an acceptable substitution for the form. Other issues with the employer's forms included failure to present twelve forms, six errors in Section 1, and the failure to complete necessary reverifications in Section 3 in three cases.

While the company indicated that it was not responsible for the forms of those individuals referred by the union, ICE disagreed (the employer, not the hiring hall, is responsible for I-9 completion). Ultimately, in 2013, ICE sought $812,665 in penalties. On July 8, 2015, this number was reduced by the Office of the Chief Administrative Hearing Officer (OCAHO) to $605,250, which comes out to about $700 per violation. Even with the reduced total, this is one of the largest fines imposed on an employer who did not knowingly employ undocumented workers.

United States v. Hartmann Studios, Inc. 11 OCAHO No. 1255 (2015)

Civil penalties

The Department of Homeland Security (DHS) or an administrative law judge may impose penalties if an investigation reveals that an employer knowingly hired or knowingly continued to employ an unauthorized alien, or failed to comply with the employment eligibility verification requirements with respect to employees hired after November 6, 1986.

The DHS will issue a Notice of Intent to Fine (NIF) when it intends to impose penalties. Employers that receive an NIF may request a hearing before an administrative law judge. If the request for a hearing is not received within 30 days, DHS will impose the penalty and issue a final order, which cannot be appealed.

Hiring or continuing to employ unauthorized aliens

If DHS or an administrative law judge determines that you have knowingly hired unauthorized aliens (or are continuing to employ aliens knowing that they are or have become unauthorized to work in the United States), you may be ordered to cease and desist from such activity and pay a civil money penalty for each offense.

You will be considered to have knowingly hired an unauthorized alien if, after Nov. 6, 1986, you use a contract, subcontract or exchange, entered into, renegotiated or extended, to obtain the labor of an alien and know the alien is not authorized to work in the United States. You will be subject to the penalties above.

Situation Analysis

In 2017, an tree-trimming company agreed to pay a record $95 million fine after years of I-9 investigations uncovered thousands of illegal workers. The company even rehired workers that had previously been let go — after they were found to be unauthorized workers in previous ICE audits.

ICE indicated that the company's senior management supported decentralized hiring so it could "remain willfully blind" as lower level managers carried out these illegal hiring practices. Managers regularly accepted fake documentation from workers and hired individuals they knew were not authorized to work in the U.S. The company relied on word-of-mouth referrals to perpetuate its below-board hiring practices.

Prosecutors indicated that the company's practices gave it an edge in its industry. Without proper work authorization, employees were particularly motivated to keep their jobs, and were willing to be relocated as necessary or work for low wages. Such an edge allowed the company to "dominate the market," again, according to prosecutors.

Failing to comply with Form I-9 requirements

If you fail to properly complete, retain, and/or make Form I-9 available for inspection as required by law, you may face civil money penalties for each violation. In determining the amount of the penalty, DHS considers:

- The size of the business of the employer being charged;
- The good faith of the employer;
- The seriousness of the violation;
- Whether or not the individual was an unauthorized alien; and
- The history of previous violations of the employer.

Good faith defense

An employer that can show that it has, in good faith, complied with Form I-9 requirements may have established a "good faith" defense with respect to a charge of knowingly hiring an unauthorized alien, unless the government can show that the employer had actual knowledge of the unauthorized status of the employee.

Cross Reference

See "Actual knowledge vs. constructive knowledge" under the "Section 2: Eligibility verification" tab for more information on when an employer knows or should have known that an employee is not authorized to work.

Criminal penalties

Engaging in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens

Employers convicted of having engaged in a pattern or practice of knowingly hiring unauthorized aliens (or continuing to employ aliens knowing that they are or have become unauthorized to work in the United States) after Nov. 6, 1986, may face fines and/or six months imprisonment.

Engaging in fraud or false statements, or otherwise misusing visas, immigration permits, and identity documents

Individuals who use fraudulent identification or employment authorization documents or documents that were lawfully issued to another person, or who make a false statement or attestation to satisfy the employment eligibility verification requirements, may be fined, or imprisoned for up to five years, or both. Other federal criminal statutes may provide higher penalties in certain fraud cases.

Key Court Case

Two women worked as housekeepers in two different hotels in Fresno, California. A Border Patrol agent took them into custody after determining they had used fraudulent social security cards and alien registration cards to prove their eligibility for employment in the U.S. Both women admitted to having bought the documentation from a street vendor in Los Angeles. A check determined that the Alien Registration Numbers they used belonged to other individuals. Both had signed I-9 forms containing the statement, "under penalty of perjury, the documents that I presented as evidence of identity and employment eligibility are genuine and relate to me. I am aware that federal law provides for imprisonment and/or fines for any false statements or use of false documents in connection with this certificate."

The Immigration and Naturalization Service (INS) filed complaints for monetary damages from each, in accordance with the provisions of the Immigration Reform and Control Act, which allowed for a penalty of $250 for each fraudulent document used. The women argued the statute did not apply to them as employees.

The administrative law judge (ALJ) granted summary judgment for the INS, and the women appealed.

Section 1324c(a) of IRCA provides, in part, that it is unlawful for any person or entity to knowingly "use, attempt to use, possess, obtain, accept, receive, or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter…"

The women alleged that the part stating that "in order to satisfy any requirement of this chapter" precluded the actions against them because it only applied to employers, not employees. While the Court acceded that most of the requirements of that section apply to employers, the Court held that the language of the statute does nothing to limit the scope of its applicability; it refers to any "person," not any "employer."

The Court upheld the ALJ's determination that the women were subject to the penalties provided for in the IRCA.

Villegas-Valenzuela v. Immigration and Naturalization Service, United States Court of Appeals for the Ninth Circuit, No. 95-70767, Decided December 20, 1996

Key Court Case

Jose Castro was laid off from his employment after participating in a union organizing campaign at his workplace. The National Labor Relations Board determined the layoffs were in violation of the National Labor Relations Act and ordered back pay to those laid off. An administrative law judge (ALJ) conducted a hearing to determine the amount of back pay to be awarded. During the course of this hearing, Castro revealed he was an illegal alien and not authorized to work in the United States. He admitted he had provided false documentation to obtain employment in the U.S.

The ALJ determined Castro was not eligible to receive back pay, based on the Immigration Reform and Control Act (IRCA), which makes it illegal for employees to use fraudulent documents to establish employment eligibility. The NLRB reversed the ALJ, citing its commitment to providing the protections of the NLRA to undocumented workers in the same manner as to other employees.

The Supreme Court heard the case and held that IRCA does not allow for the award of back pay to undocumented illegal aliens who were never authorized to work in the U.S. The Court stated, "[t]he Board asks that we … allow it to award back pay to an illegal alien for … wages that could not lawfully have been earned, and for a job obtained … by a criminal fraud. … Awarding back pay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer … Awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations."

Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, United States Supreme Court, No. 00-1595, Decided March 27, 2002

Personal liability

Many employers work hard to communicate the importance of I-9 compliance to employees whose job it is to complete the form with other employees, but not everyone understands how serious the seemingly simple form can be. Employees with I-9 responsibilities may be interested to know that they could be held *personally* liable for errors and omissions related to the Form I-9.

A cautionary tale

In May 2015, a woman in New York was convicted of submitting a false written statement on the I-9. The woman signed (under penalty of perjury) in the preparer/translator area of Section 1 of the form, attesting that she had assisted the employee in completing Section 1 and that "to the best of [her] knowledge, the information is true and correct."

While individuals who make such attestations in good faith won't typically face legal liability, this employee *knew* that the employee with whom she was completing the form was *not* authorized to work. Further, she knew the employee wasn't even in the country legally. Yet, she indicated in Section 1 of the I-9 that the employee was a lawful permanent resident.

Because of the falsification, the employee was criminally prosecuted after her company's hiring practices were investigated by Immigration and Customs Enforcement (ICE). The law (18 USC Section 1001) prohibits individuals from making false statements to government agencies, and a violation of that statute carries a maximum sentence of five years in prison and a fine of up to $250,000. With the help of her attorney, this particular employee made a plea agreement and was sentenced to one year of probation.

While personal liability is not an extremely common situation, it is a risk built in to the I-9 process. Employers must help employees with I-9 responsibilities understand the seriousness of completing the form, not only on the employer's behalf, but also from a personal perspective.

Employers (especially those with I-9s that could be in better shape) may also want to review the purpose of the Form I-9 with those whose responsibility it is to manage the process. Relaying the possibility of personal liability and the details of stories like the one outlined here might just provide the extra motivation employees need to make sure they're completing the forms correctly, completely, and in good faith.

Mitigating damages

An employer faced with a federal audit can influence its outcome by providing full cooperation and working to show the employer's good faith efforts to comply with I-9 requirements. Employers would do well to remember that while auditors work for federal agencies, they are human, and will appreciate working with employers who do not make the audit process more difficult than necessary. As mentioned, some employers choose to retain legal counsel when faced with a federal I-9 audit.

The decision of whether or not to hire counsel will depend on a number of factors, including the state of the employer's I-9 processes and forms, and the employer's level of comfort with the Form I-9 process.

Best Practice

An employer who gives a federal auditor its full cooperation and shows a good faith effort to comply with Form I-9 requirements may be able to limit fines and penalties imposed.

Is there room for negotiation with Form I-9 fines?

Even after ICE has completed a Form I-9 audit and has issued a Notice of Intent to Fine (NIF), the employer still has some recourse. Within 30 days, the employer may request a hearing with the Office of the Chief Administrative Hearing Officer (OCAHO), which hears cases arising out of I-9 issues.

Whether or not to pursue litigation is usually a monetary decision for employers, who must consider whether the potential reduction in fines could outweigh the costs involved in challenging the NIF. While the answer won't always be in the affirmative, it's not uncommon for OCAHO to disagree significantly with ICE's assessment of appropriate fines levied

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