

THE UNIVERSITY OF TEXAS SCHOOL OF LAW
44TH ANNUAL CONFERENCE ON IMMIGRATION AND NATIONALITY LAW
October 21-22, 2020, AT&T Conference Center,
Austin, Texas

**PRACTICE POINTER NUGGETS TO IDENTIFY KEY ISSUES IN WORKSITE
COMPLIANCE (I-9 AUDITS AND ENFORCEMENT) AND EMPLOYMENT BASED
INVESTOR VISAS (EB-5)**

Richard A. Gump, Jr.
Richard A. Gump, Jr., P.C.

www.rickgump.com

rick@rickgump.com

I. Fundamentals and current issues in Worksite Compliance (I-9 Audits and Enforcement).

A. I-9 audits are the key components in the Immigration and Customs Enforcement's (ICE) goal of developing a culture of compliance by employers to minimize illegal immigration and unauthorized employment. Audits are less expensive than criminal sanctions and can cover thousands of employers each year.

B. Violations relating to worksite compliance include hiring and continuing to employ unauthorized aliens as well as verification mistakes (often called paperwork violations) with the following penalties:

1. Knowingly hiring, recruiting, referral, or retention of unauthorized aliens – penalty for first offense per unauthorized alien \$583 to \$4,667
2. Penalty for second offense \$4,667 to \$11,665
3. Penalty for third or subsequent offense \$6,999 to \$23,331
4. Penalty for I-9 paperwork violations \$234 to \$2,332

The penalties above are for violations occurring after the publication of inflation adjustments. *See* 2020-11124 Fed. Reg. (June 17, 2020) at 36469, Table 3. Note that ranges exist for both ICE and the Administrative Law Judges under the Office of the Chief Administrative Hearing Office (OCAHO) to evaluate factors for and against the employer. Five of these factors can be found at 8 USC 1324a.(e)(5). In addition, multiple violations are accounted for in the civil monetary scheme. Arguably, employers should never be shifted from civil to criminal liability unless specific criminal laws are violated or some other egregious conduct has occurred. See criminal liability discussed in H below.

C. All employers—no matter the size, industry, or nature of the business—are required by law to complete an I-9 for each employee. The I-9 must be completed within a certain timeframe and the I-9s must be retained and made available to ICE in the event of an audit. It is important to review the USCIS instructions for Form I-9, Employment Eligibility Verification, the Handbook for Employers M-274, and on line at I-9 Central before completing or answering questions on I-9 completion.

D. Common mistakes made by employers during verification of employment authorization and completion of I-9:

1. Not being consistent with the verification process for all new hires or treating employees differently when completing the I-9 based on perceived status.
2. Completing Section 1 on behalf of the employee.
3. Not evaluating employment authorization by reviewing documents from List A or List B and List C to determine if the documents are genuine on their face and relate to the employee.
4. Failing to obtain the employee signature in Section 1 or the employer Representative signature in Section 2.
5. Not completing the I-9 within three business days of the date of hire.
6. Requesting more documents or specific documents from an employee to verify authorization rather than allowing the employee to choose from Lists A, B, and C.

7. Failure to maintain I-9s for the proper retention period (One year from date of termination or three years from date of hire, whichever is later).

E. Electronic maintenance of I-9s has become more common and many systems and options are available. I-9s can be completed in paper form and converted to electronic versions or they can be completed online; but, in either case they must follow the same format and contain all the information as the paper form and must contain either a wet signature or a fully traceable electronic signature. *See* USCIS Handbook for Employers M-274, Section 9.1 at <https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/90-retaining-form-i-9/91-form-i-9-and-storage-systems>. The regulations relating to electronic maintenance of I-9s can be found at 8 CFR 274a.2(a)(2).

F. E-Verify is a software program owned by the United States Customs and Immigration Services (USCIS). Using the information gathered by completing the I-9, the employer inputs the employee's information and documents to the E-Verify system, which then checks it against government records to determine if the individual has current employment authorization in the US. E-Verify also uses a photo tool for some documents to try and combat identity theft or the borrowing of someone else's documents. Employers may be required to use E-Verify if 1) they are located in a state with mandatory E-Verify (most states have different rules with regard to public/private employers, size of company, etc.); 2) if they have federal government contracts governed by the Federal Acquisition Rule (FAR), or, 3) they are bound by civil contracts or a previous ICE settlement. While E-Verify can help prevent the hiring of unauthorized workers, it also provides the government with direct access to the employer's I-9 information and enables them to mine employer practices to evaluate potential liability. E-Verify should be discussed with every employer client to determine if it is in the best interest to sign up for this free system. While it adds an additional step to the verification process and can lead to discrimination investigations or other issues, it serves as a preemptive barrier to hiring employees who are not authorized and would need to be terminated during an audit.

G. The IMAGE program, run by ICE with input from USCIS, is often referred to as E-Verify on steroids. In addition to verifying employees through the I-9 process and checking documents on E-Verify, the employer must agree to an audit by ICE as well as the adoption of other best practices. The benefit to the employer is a reduced likelihood of unauthorized employees slipping through the cracks, reduced fines for unauthorized workers found in the audit, and a better public image for high profile companies in need of positive press coverage. ICE is promoting IMAGE and is looking for stakeholders to assist in marketing it to employers. In addition to discussions of E-Verify, clients should be advised on the positives and negatives of IMAGE.

H. Employers may find themselves entangled in criminal investigations based on a variety of statutes related to the hiring or employment of unauthorized individuals. These statutes include fraud, harboring, aiding and abetting or encouraging an unauthorized alien to remain in the U.S., knowing hiring of unauthorized aliens, and the continued employment of unauthorized aliens. The line between civil and criminal liability can be very thin, and clients must be advised of the most common situations that lead to criminal sanctions. ICE often uncovers facts or information during an I-9 audit that they pass on to

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Practice Pointer Nuggets to Identify Key Issues in Worksite Compliance (I-9 Audits and Enforcement) and Employment Based Investor Visas (EB-5)

Also available as part of the eCourse

[Crumbling Foundation of Immigration Law: Effects of Restrictive Anti-Immigration Policies on Your Practice](#)

First appeared as part of the conference materials for the
2020 Fundamentals of Immigration and Nationality Law session

"Crumbling Foundation of Immigration Law - Effects of Restrictive Anti-Immigration Policies On Your Practice"