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Key I-9 Audit and Compliance Issues

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Employers are required to verify all employees on Form I-9, as required by law since 1986. One would think the verification process would have become well settled over this 36-year period but that certainly is not the case. The three-page Form I-9 is accompanied by fifteen pages of instructions and a Handbook for Employers (M-274) that has fifty-five pages. The M-274 is supported online by USCIS I-9 Central. Despite this guidance, which usually adds to the lack of clarity, employers continue to be fined excessively by Immigration and Customs Enforcement (ICE) for what are called “paperwork” violations—mistakes made in the completion of the Form I-9 regardless of whether unauthorized workers are involved in an ICE Homeland Security Investigations (HSI) audit.

Most recently, United States Citizenship and Immigration Services (USCIS) proposed a new version of the Form I-9, which would change Section 1 and 2 of the Form I-9 back to a single page with two addenda pages and the list of acceptable documents (LOAD).¹ Please refer to the comment on this proposal submitted by the American Immigration Lawyers Association (AILA).²

Aside from the completion of the I-9, employers can run afoul of other compliance issues due to the questions asked when hiring or verifying employment authorization. These include violations of citizenship discrimination and document abuse, both of which are enforced by the Department of Justice’s Immigrant and Employee Rights division (IER). The goal of this Practice Advisory is to point out common areas of concern to the practitioner for the purpose of assisting clients in minimizing mistakes that can lead to expensive fines. The compliance topics addressed herein are:

- The top ten mistakes made when completing the Form I-9 that can lead to fines
- Transitioning from remote to in person verification
- Automatic extension of certain documents
- Acceptable pre-hire questions to screen applicants
- Citizenship discrimination and document abuse violations enforced by IER
- E-Verify issues

Top 10 Mistakes in Verifying and Presenting I-9s

1. **Failure to verify an employee on the Form I-9.** Far too often an audit reveals that several employees have slipped through the cracks and the employer has failed to complete a Form I-9 during onboarding. Sometimes this failure is done intentionally when the employer knows the individual is unauthorized and the employer does not want to commit fraud but is willing to risk fines for an unauthorized hire. Failing to complete Form I-9 for an employee will result in a fine during an ICE audit.
2. **Knowingly accepting fraudulent documents.** A civil fraud statute and a criminal fraud statute can ensnare an employer who hopes to be considered innocent in a Form I-9 audit

¹ 1 87 FR 40857 (July 8, 2022).

² See Comment to Proposed Revision of a Currently Approved Collection: Employment Eligibility Verification (Form I-9); OMB Control Number 1615 0047 AILA Doc. No. 22081001 (Posted 8/10/22).

by claiming victimization by the employee. The employer must make an in-person tactile examination of the documents presented and in good faith determine they are genuine and relate to the individual. However, if the employer knows the documents are fraudulent, ICE likely will discover this fact and may result in a criminal investigation.

3. **Timeliness.** The law requires that Section 1 of Form I-9 must be completed no later than the employee's first day of employment for pay and no earlier than the time of hire—when the offer of employment is accepted. Section 2 of Form I-9 must be completed within three business days of the employee's first day of employment (date of hire). Unlike many other types of mistakes, timeliness is an error that can never be corrected. Once these deadlines have passed, it becomes a substantive violation and will result in a fine during an ICE audit. When a company must complete many Form I-9s at one time, such as in a merger and acquisition of another company where the legacy employees are treated as new employees, the three-day time limit can be cumbersome.
4. **Failure by the employee to check a status box in the attestation portion of Section 1.** The attestation portion of Section 1 is important because the employee must attest to the status that makes him employment authorized. Leaving this part blank or checking the wrong box can lead to a violation. The employer is responsible for ensuring that Section 1 is fully completed, and that the status attested to in Section 1 matches the documents provided for Section 2. The employer is not necessarily responsible for the truthfulness of the attestation content; however, if the employer knows the employee is checking the wrong box or tells the individual to check an incorrect box, the employer could be charged with criminal fraud.
5. **Unsigned Section 1 or Section 2.** Simply filling in information on the Form I-9 does not meet the verification requirement. ICE requires that the employee sign Section 1 on his first day of employment and that the employer representative who viewed the documents signs Section 2 within three business days. A lack of signatures could lead to further questioning by ICE due to suspicion that the failure was purposeful to avoid liability for fraud.
6. **Requesting or verifying too few or too many supporting documents in Section 2.** To verify an employee's authorization, an employer must physically review either qualifying List A document (s), or one document from List B AND one document from List C. Only obtaining a social security card does not verify work authorization appropriately and can lead to discrimination violations. The best practice as to documents is to present page 3 of the Form I-9 to the employee and have them pick from the lists as to what to provide rather than requesting any specific documents. Asking for particular documents (citizenship discrimination) or requesting additional documents (over documentation) when valid documents that meet the requirements have already been presented will likely lead to an investigation and fine by IER. One exception to requesting an additional document is when an individual provides a restricted social security card, but many employers ignore the warning on the card and accept this card without further questioning.
7. **Failure to review the documents in person with a tactile examination.** The employer can rely on an agent or authorized representative, but the review and examination of the employee's documents must be performed correctly. The law requires that a physical

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