

Surviving an I-9 Inspection Conducted by U.S. Immigration and Customs Enforcement ("ICE")

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Agenda

- Introduction and inspection trends
- Inspection process
- Form I-9 compliance
- Mitigating and defending a post-inspection fine from ICE

Introduction and Inspection Trends

- 8 CFR 274a of Immigration and Nationality Act
 - Governs the unlawful employment of aliens, including, Form I-9 compliance
 - Matters reviewed by the Office of the Chief Administrative Hearing Officer (“OCAHO”)
 - OCAHO opinions are appealable to the federal court of appeals

Introduction and Inspection Trends

- I-9 inspection history
 - Prior to the Trump Administration, inspections targeted industries that are known to employ immigrants
 - Construction, hospitality, food preparation, health care, and retail
 - Smaller companies were usual targets

Introduction and Inspection Trends

- Modern trend
 - I-9 inspections have significantly increased during the Trump Administration
 - Inspections are being conducted on a wide variety of industries
 - Inspections are being conducted on large and small companies

Introduction and Inspection Trends

- The big raid
 - January 10, 2018, ICE conducted I-9 inspections on 98 7-Eleven convenience stores
 - It is reported as the largest operation against an employer so far under the Trump Administration

Introduction and Inspection Trends

- Derek Benner's statements (HSI Director)
 - “you're going to see more and more of these large-scale compliance inspections...”
 - “It's not going to be limited to large companies or any particular industry, big medium or small.”

Introduction and Inspection Trends

- Thomas Homan's statements (ICE Dir.)
 - “Today's actions send a strong message to U.S. businesses that hire and employ an illegal work force.”
 - Homan vowed to "significantly" increase worksite raids and ordered ICE agents to increase work site investigations by "four to five times.”
 - Suggested a “400%” increase in inspections

Introduction and Inspection Trends

- Asplundh Tree Experts Co. inspection
 - Hired employees by accepting identification documents it knew to be fraudulent
 - Exploited unauthorized aliens to maximize profits
 - Record breaking \$95 million fine

The Inspection Process

- Notice of Inspection (“NOI”)
 - Initiates inspection process
 - Provided with at least 3 business days to produce I-9 forms
 - Must provide supporting documentation
 - Payroll, list of current employees, Articles of Incorporation, and business licenses

The Inspection Process

- Technical / Procedural Violations
 - Minor violations that do not prohibit ICE from determining employment eligibility status
 - Ten business days to make corrections
 - Common examples:

The Inspection Process

- Employee failure to provide maiden name, address, or date of birth
- Failure to provide Preparer or translator information
- Failure to provide document title, ID numbers and expiration dates of List A document or List B and List C documents (must send copies)
- Failure to provide the title, business name and address in Section 2

The Inspection Process

- Substantive violations
 - Prevent ICE from determining eligibility status
 - Common examples
 - Failure to prepare I-9
 - Employee failure to check citizenship status box in Section 1
 - Employee failure to sign Section 1

The Inspection Process

- Failure to complete Section 2 within 3 business days of hire
- Failure to provide proper List A or List B and List C documents or information
- Section 2 dates – hire date and completion
- Employer failure to sign Section 2
- Failure to complete Section 3

The Inspection Process

- Knowing violation
 - Knowingly employing an unauthorized alien
 - Good faith is a defense (explained below)
 - Warrants harshest fine

The Inspection Process

- Types of notices
 - Notice of Inspection
 - Notice of Suspect Documents
 - Unauthorized employee; warning; chance to cure deficient documents
 - Notice of Discrepancies
 - Unable to determine eligibility; employee must cure

The Inspection Process

- Notice of Technical Failures
 - ICE provides 10 days to cure
- Warning Notice
- Notice of Intent to Fine

The Inspection Process

- Penalties
 - Five considering factors
 - Size of the business
 - Good faith effort to comply
 - Seriousness of violation
 - Involvement of unauthorized workers, and
 - History of previous violations

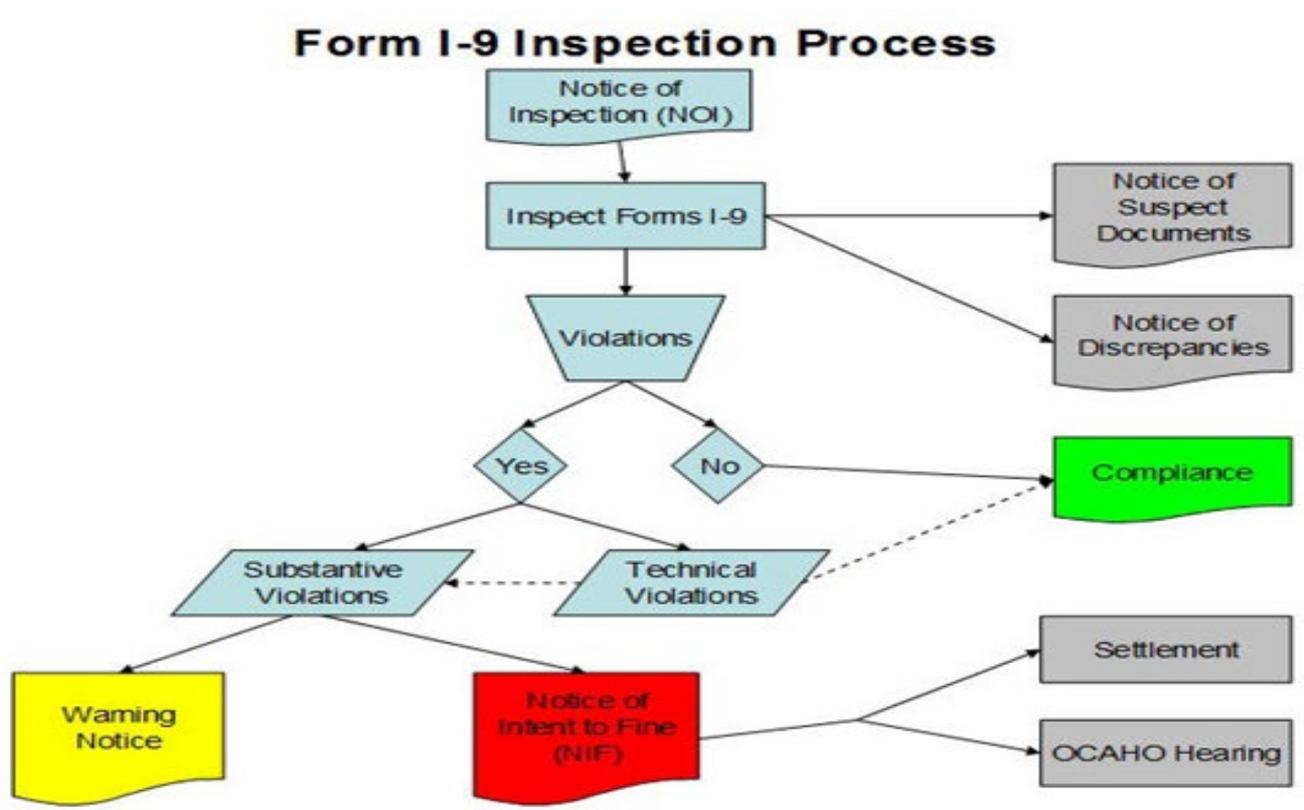
The Inspection Process

- Fines for substantive violations
 - Range from \$220 to \$1,862 per violation (1st offense)
 - Aggravating circumstances may increase fine
 - Large percentage of errors
 - Multiple knowing violations
 - Repeat offenses

The Inspection Process

- Fines for knowing violations (1st offense)
 - Range from \$548 to \$3,726 per violation.
 - Repeat offenders may be fined more than \$10,000 per violation.

The Inspection Process



Graphic courtesy of U.S. Immigration and Customs Enforcement www.ice.gov

Form I-9 Compliance

Section 1. Employee Information and Attestation <i>(Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)</i>				
Last Name <i>(Family Name)</i>		First Name <i>(Given Name)</i>		Other Last Names Used <i>(if any)</i>
Address <i>(Street Number and Name)</i>		Apt. Number	City or Town	State ZIP Code
Date of Birth <i>(mm/dd/yyyy)</i>	U.S. Social Security Number [][] - [][] - [][][][]	Employee's E-mail Address		Employee's Telephone Number

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

Graphic courtesy of U.S. Immigration and Customs Enforcement www.ice.gov

Form I-9 Compliance

I attest, under penalty of perjury, that I am (check one of the following boxes):

<input type="checkbox"/> 1. A citizen of the United States
<input type="checkbox"/> 2. A noncitizen national of the United States <i>(See instructions)</i>
<input type="checkbox"/> 3. A lawful permanent resident (Alien Registration Number/USCIS Number): _____
<input type="checkbox"/> 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy): _____ Some aliens may write "N/A" in the expiration date field. <i>(See instructions)</i>
<p><i>Aliens authorized to work must provide only one of the following document numbers to complete Form I-9: An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.</i></p> <p>1. Alien Registration Number/USCIS Number: _____ OR</p> <p>2. Form I-94 Admission Number: _____ OR</p> <p>3. Foreign Passport Number: _____ Country of Issuance: _____</p>
<p>QR Code - Section 1 Do Not Write In This Space</p>

Signature of Employee	Today's Date (mm/dd/yyyy)
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Preparer and/or Translator Certification (check one):

I did not use a preparer or translator. A preparer(s) and/or translator(s) assisted the employee in completing Section 1.
(Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator		Today's Date (mm/dd/yyyy)	
Last Name (Family Name)		First Name (Given Name)	
Address (Street Number and Name)	City or Town	State	ZIP Code

Graphic courtesy of U.S. Immigration and Customs Enforcement www.ice.gov

Form I-9 Compliance

Section 2. Employer or Authorized Representative Review and Verification				
<i>(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")</i>				
Employee Info from Section 1	Last Name (Family Name)	First Name (Given Name)	M.I.	Citizenship/Immigration Status
List A Identity and Employment Authorization		OR	List B Identity	AND List C Employment Authorization
Document Title	Document Title	Document Title	Document Title	Document Title
Issuing Authority	Issuing Authority	Issuing Authority	Issuing Authority	Issuing Authority
Document Number	Document Number	Document Number	Document Number	Document Number
Expiration Date (if any)(mm/dd/yyyy)	Expiration Date (if any)(mm/dd/yyyy)	Expiration Date (if any)(mm/dd/yyyy)	Expiration Date (if any)(mm/dd/yyyy)	Expiration Date (if any)(mm/dd/yyyy)
Document Title	Additional Information	QR Code - Sections 2 & 3 Do Not Write In This Space		
Issuing Authority				
Document Number				
Expiration Date (if any)(mm/dd/yyyy)				
Document Title				
Issuing Authority				
Document Number				
Expiration Date (if any)(mm/dd/yyyy)				

Graphic courtesy of U.S. Immigration and Customs Enforcement www.ice.gov

Form I-9 Compliance

- List A documents – identity and authorization
- Common documents
 - Passport
 - Permanent resident alien card
 - Employment authorization card

Form I-9 Compliance

- List B documents – establishes identity only
 - Driver license
 - State identification card
 - Voter identification card
 - School identification card

Form I-9 Compliance

- List C documents – establishes employment authorization only
 - Social security card
 - Birth certificate

Form I-9 Compliance

(2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): _____ (See instructions for exemptions)

Signature of Employer or Authorized Representative		Today's Date (mm/dd/yyyy)	Title of Employer or Authorized Representative	
Last Name of Employer or Authorized Representative		First Name of Employer or Authorized Representative		Employer's Business or Organization Name
Employer's Business or Organization Address (Street Number and Name)		City or Town	State	ZIP Code

Section 3. Reverification and Rehires (To be completed and signed by employer or authorized representative.)

A. New Name (if applicable)			B. Date of Rehire (if applicable)	
Last Name (Family Name)	First Name (Given Name)	Middle Initial	Date (mm/dd/yyyy)	

C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title	Document Number	Expiration Date (if any) (mm/dd/yyyy)
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I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Today's Date (mm/dd/yyyy)	Name of Employer or Authorized Representative
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Graphic courtesy of U.S. Immigration and Customs Enforcement www.ice.gov

Form I-9 Compliance

- Correcting Form I-9
 - Use a different color pen and initial all changes
 - Use a new Form I-9 if necessary
 - Do not destroy old I-9 forms
 - Do not back date I-9s forms
 - Prepare letter to explain uncorrectable errors

Form I-9 Compliance

- Form I-9 retention requirements
 - Employer may destroy former employee I-9s three years after date of hire or one year post-termination, whichever is longer
 - I-9s outside of this scope are not subject to inspection

Form I-9 Compliance

- Tips for compliance
 - Implement Form I-9 completion as part of hiring process
 - Incorporate a calendaring system to re-verify employees within scope of Section 3
 - Organize I-9 records
 - Conduct periodic internal audits

Mitigating and Defending I-9 Fine

- Retention limitation (addressed above)
 - Former employees hired within three years from the date inspection or are one year post-termination from date of inspection are subject to inspection
 - The longer date governs

Mitigating and Defending I-9 Fine

- Example
 - Employee A hired 1/1/2010 and fired 1/1/2013
 - Employee B hired 2/1/2015 and fired 2/1/2016
 - Employee C hired 1/1/2010 and fired 2/1/2017

Mitigating and Defending I-9 Fine

- Notice of Inspection received 1/1/2018
- Employees B and C are subject to inspection
- Employee A is exempt
 - Notice of inspection received more than 3 years from date of hire and more than 1 year post-termination

Mitigating and Defending I-9 Fine

- Substantial compliance
 - Affirmative defense
 - The following elements must be proven:
 - Use of an INS Form I-9
 - Employer's signature in Section 2
 - Employee's signature in Section 1

Mitigating and Defending I-9 Fine

- Section 1 check mark indicating the employee is either a citizen United States or a lawful permanent resident or an alien authorized to work until specified date, and
- Proper List A or Lists B and C documentation must be provided (copies may save you)

Mitigating and Defending I-9 Fine

- Good Faith Defense – knowing violations only
 - Proof of good faith compliance with the employment verification requirements provides a rebuttable affirmative defense
 - Will not apply to paperwork violations (technical and substantive violations discussed above)

Mitigating and Defending I-9 Fine

- The Eight Amendment excessive fines clause
 - A fine that is so excessive that it outweighs the gravitational relationship to the offense
 - The question is one of proportionality
 - Argue the five factors

Mitigating and Defending I-9 Fine

- Other defenses
 - The employee must have received wages or remuneration from the employer to be subject to inspection
 - Procedural issues
 - Pay attention to exact wording on NOI
 - Proper service – should be officer or res agent

Mitigating and Defending I-9 Fine

- Staffing companies and Professional Employment Organizations (“PEO”)
 - Staffing companies – as a general rule, the staffing company is responsible for Form I-9 retention and responding to NOI
 - PEO – as a general rule, the employer will be responsible Form I-9 retention and responding to NOI

Mitigating and Defending I-9 Fine

- What are we seeing?
 - Significant increase in ICE inspections since January 1, 2018
 - Large and small scale inspections
 - Fines average \$750 to \$1,900 per violation
 - ICE will fine anything and everything

Mitigating and Defending I-9 Fine

- ICE looks favorably upon proactive efforts to achieve compliance
- Proper responses to a notice of intent to fine often results in significant reductions in the fine
- It is imperative to contact counsel when NOI is received; or better yet, for periodic internal audits

War Stories

- Restaurant Franchise
 - Misread NOI
 - 600 plus violations
 - Fine = \$600,000+
 - We are still battling ICE, but the number is less than \$200,000

War Stories

- Dr. Office
 - Used staffing agency
 - Office manager produced wrong documents
 - Counsel involved post-inspection to mitigate \$40,000 fine for 20 violations
 - Likely would have been avoided if NOI properly responded to

War Stories

- Manufacturing Plant
 - Contacted post NOI, but before inspection
 - Conducted internal audit and found errors on all employee I-9s, plus unauthorized workers
 - Prevented all knowing violations and made revisions where possible

War Stories

- Restaurant 2
 - contacted for internal audit prior to NOI
 - Contacted post NOI to prepare for inspection
 - Made revisions as necessary for new hires since internal audit
 - Fine should be nominal or avoided