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Immigration Enforcement and Employment Verification

I-9 Compliance in an Era of Extreme Vetting

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THE GOVERNMENT'S MOST DIFFICULT FORM



THE EVER MUTATING I-9 FORM

- On November 14, 2016, USCIS issued a new version of the I-9 form with a mandatory use date of January 21, 2017. For the first time, a “Smart” version of the new form was made available. Detailed new instructions were also included.
- After January 21, 2017, no prior versions of the I-9 form could be used. Failure to use the proper form could result in fines.
- Subsequently, another revised version of the I-9 was issued on July 17, 2017, with a mandatory use date of September 18, 2017.
- The M-274 Handbook for Employers, although recently updated, may not reflect all changes on the I-9 forms, and subsequent guidance. When in doubt it is best to seek guidance. Where reliance is made on a section of the Handbook, note the reference in the margin.

SIGNIFICANT CHANGES TO THE I-9 FORM NOVEMBER 2016

- Instructions expanded to 15 pages - now separate from form.
- Changes to Section 1 to address delays in issuance of electronic I-9 records by adding a third option for work authorized aliens.
- Employees may use a P.O. Box for address (but employers may not).
- All spaces must be filled - use N/A if the question doesn't apply.
- Employers now required to indicate employee citizenship at top of page 2. This corresponds to checkbox the employee must complete in Section 1.
- Employees now required to affirmatively indicate whether a translator/preparer was used. New supplement if multiple translators/preparers used.



I-9 FORM CHANGES CONT.

- New field in Section 2 which may be used to document continuing work authorization for certain foreign nationals as well as other relevant I-9 information. (TPS, STEM, CAP-Gap, H-1B extensions).
- Section 3 changes require including the last name, first name and middle initial of employee from Section 1. Reverification must be done on the most current version of the form. For a rehire, an employer may use Section 3 or use a new form.
- The “Smart” form is **not** an electronic I-9. It is a tool which provides prompts for missed fields, has drop down tables for recording documents and in-line access to instructions. It also had a number of format/technical problems which have been largely addressed.

7/17/2017 Changes:

- Report of Consular Report of Birth Abroad added to List C documents.
- All certifications of report of birth issued by the DOS listed in C.
- C documents renumbered.



I-9 TRICKS AND TRAPS

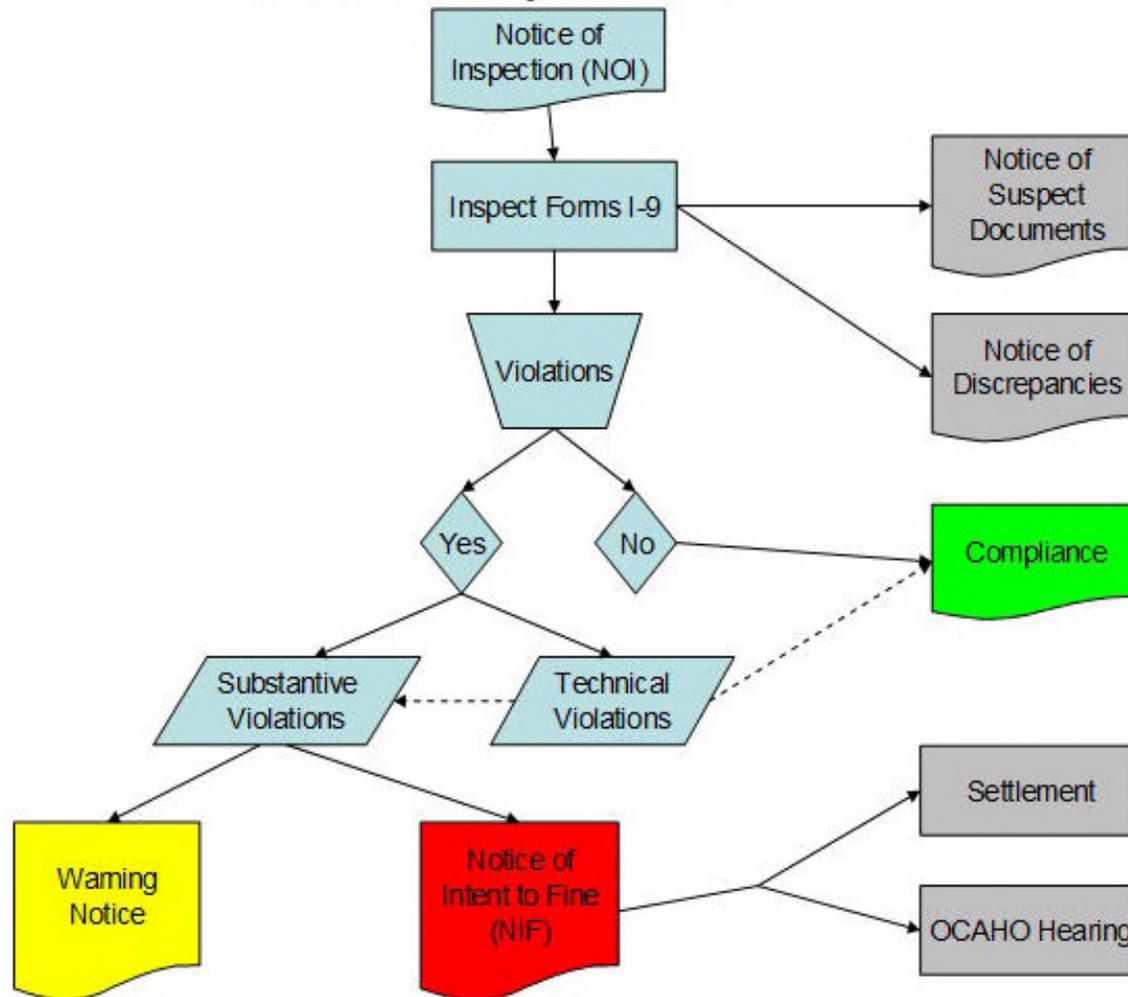
- H-1B and the ten day grace period.
- Expiring Green Card.
- Asylees and Refugees.
- TPS and extension via rule making.
- The limited benefits of the “receipt” rule.
- To copy or not to copy the documents?

ICE AUDIT AND ENFORCEMENT



THE I-9 INSPECTION PROCESS

Form I-9 Inspection Process



IRCA VIOLATIONS

Civil Violations

- Technical Violations.
- Substantive Violations.
- Knowing Hire.
- Continuing to Employ.

Criminal Violations

- Harboring.
- Encouraging or Inducing.
- Transporting.
- Money Laundering.

NEW PENALTY STRUCTURE

- Penalties were effectively doubled across the board for all violation types effective November 2016.
- Paperwork violations (per individual) - a minimum of \$216 to a maximum of \$2,156.
- Unlawful employment of aliens (per alien):
 - A minimum of \$539 to a maximum of \$4,313 for violations resulting in an initial order;
 - A minimum of \$4,313 to a maximum of \$10,781 for violations resulting in a second order; and
 - A minimum of \$6,469 to a maximum of \$21,563 for subsequent violations.

ENHANCEMENT MATRIX

Factor	Aggravating	Mitigating	Neutral
Business size	+ 5%	- 5%	+/- 0%
Good faith	+ 5%	- 5%	+/- 0%
Seriousness	+ 5%	- 5%	+/- 0%
Unauthorized Aliens	+ 5%	- 5%	+/- 0%
History	+ 5%	- 5%	+/- 0%
Cumulative Adjustment	+ 25%	- 25%	+/- 0%

OTHER SANCTIONS

- Asset Forfeiture – imposed in connection with criminal proceedings.
- Debarment from Federal Contracts – if found to be employing persons without employment authorization. One year bar. Applies only to hiring violations and not paperwork violations.
- State sanctions – some states impose their own sanctions relating to the receipt of public money (Virginia).

COMMON VIOLATIONS

- Employee failing to tick any box in Section 1.
- Employee failing to include date after signature.
- Failing to complete the I-9 process within the three day window from start of employment.
- Failing to properly list documents (or thinking photocopies are a substitute for completing form).
- Accepting documents which are clearly not acceptable (appear irregular or copied, not on acceptable document list).
- Employer not completing attestation in Section 2.

ADDITIONAL COMMON I-9 VIOLATIONS

- Employer failing to include date in Section 2 to show process was timely completed.
- Not following up on expiring or expired work authorization documents. No recertification.
- Making changes or corrections to the form without annotations.
- Not personally inspecting original documents.
- Using an old and expired version of the form.

Also be aware of IRCA's Document abuse and discrimination provisions.



ENFORCEMENT ACTIVITY

- Present Administration is looking to hire up to 10,000 new agents to enforce immigration laws.
- While current activities appear to focus on individuals, one should not discount employer directed enforcement activities. Particularly in light of the potentially huge fines which may be assessed.
- Employers can expect an increase in I-9 inspections and audits “by four to five times.” - *Tom Homan, Acting Director, Immigration and Customs Enforcement.*

WHAT YOU CAN DO TO PROTECT AGAINST ICE



DEVELOPING AN I-9 COMPLIANCE PLAN

- Your best defense against fines and penalties is an I-9 Compliance Plan and Audit Procedure.
- Your internal policy will:
 - Spell out the process for completing Form I-9, completing reverification.
 - Identify who is responsible.
 - Require a training process.
 - Identify relevant USCIS publications/sources.
 - Set out a process for maintaining I-9s as required by law.
 - Identify chain of command regarding I-9 issues.
 - Set out an audit process.

AUDIT PROGRAM

- Audits are not mandated by law, but are highly recommended.
- May be considered evidence of “good faith” in mitigation of penalty.
- Will also enable employer to identify and correct technical and substantive errors and identify unauthorized workers before an ICE audit.
- An audit program should be written and provide clear guidance for each step of the process.

AUDIT CONSIDERATIONS

- Frequency - Annually? Every two years? -
Dependent on size of company and past practice.
- Which files to review - All? All hires in past X
years? Sample?
- Discriminatory and retaliatory audits will present
more significant problems. Never single out any
one ethnic group or class.
- Who will review?
- How will corrections be made and (and by who)?
- How will document problems be addressed?

WHAT TO LOOK FOR

- Was the correct form used?
- Are all relevant sections completed?
- Is there any incorrect information?
- Does the information match the person/documents?
- Any inconsistent information (multiple use of same SSN, names do not match)?
- Are the documents proper A/B/C documents?
- Do the documents (if copied) raise any concerns (typeface, style not appropriate, uneven lines, etc.)?

WHAT TO DO WHEN YOU FIND PROBLEMS

- Identify issues by form section and type (i.e. missing information, incorrect information, missing document information, etc.)
- Section 1 information may only be corrected by the employee.
- Errors in Sections 2 and 3 are to be corrected by the employer, preferably the SAME person who completed the I-9 in the first instance.
- Never EVER backdate any information on the form.
- Do NOT discard or destroy an existing I-9 form - If you need to make updates or corrections on a new form, staple the old one to the new one.



CORRECTING ERRORS

- If information is missing on the form, and the correct information is known, the information may be added to the form provided it is possible to identify the addition as a correction to the form.
- Draw a line through incorrect information.
- Use a different color pen if possible.
- Annotate the change with the date it is made and initials of person making the corrections. If multiple changes are made a note describing the nature of the change may be in order.
- If the I-9 is missing for a current employee, complete a new I-9. Include an explanation – signed and dated.

AUDIT GUIDELINES CONTINUED

- If no documents were recorded or unacceptable documents attached, you may need to redo the I-9 process for the employee - whether documents were properly acceptable is determined by the date I-9 was first completed.
- If the wrong version of the form is used, an employer may correct the error by signing and dating a blank version of the new form and stapling to the completed I-9, including a notation as to why the blank version is attached. Alternatively, may be added to the old form with an explanation that the old form was completed correctly and in good faith.
- If there are multiple errors on the form, a new form may also be in order.

USICS GUIDANCE MATERIALS

- M-274 Handbook for Employers: Guidance for Completing Form I-9.
- OSC Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits.
- Free seminars and I-9 Central.
- USCIS will sometimes provide clarifications through regular conferences with the American Immigration Lawyers Association.

DIFFICULT CASES

- Employee is unable to present documentation within the timeframe set by the employer.
- Employee confesses that he/she provided false documents previously, but now has proper documentation.
- Employee tells you that he/she is unauthorized, but is “working with an attorney.”
- Employer receives a “tip” that an employee is unauthorized.

LOOKING FORWARD

- Stepped up Enforcement.
- Increasing litigation over fines.
- Tightening of traditional categories for workers (H-1B).
- Increased consular, CBP and CIS scrutiny.
- Disappearing employment authorization:
 - DACA.
 - TPS.
 - STEM.

QUESTIONS

