



ICE: Is Your Business Prepared for a Silent Raid?

by Tina M. Aiken

Immigration reform has been on the government's radar for some time, and 2014 promises to be no different. Over the past four years, U.S. Immigration and Customs Enforcement (ICE) has audited the I-9 employment records of over 10,000 employers and imposed more than \$100 million in fines. In September 2013, ICE notified another 1,000 employers that it would be conducting I-9 compliance and worksite enforcement audits. This new wave of "silent raids" is the largest round of I-9 inspections since 2009.

The Immigration and Nationality Act (INA) requires employers to verify the identity and employment eligibility of all individuals hired in the United States, and the Employment Eligibility Verification Form I-9 is the means of documenting this verification. The new revision of the I-9 form, released in March 2013, includes an instruction handbook to walk employers through the documentation process. However, there is significant room for error when completing the form, ranging from minor technical errors to substantive errors that cannot be remedied. ICE enforces the law by conducting worksite inspections and assessing criminal and civil sanctions for employment-related violations. Inspections are prompted by leads and tips obtained from a variety of sources, and no industry — regardless of size, type or location — is exempt from an ICE investigation.

However, employers do not need to wait until immigration officials come knocking. You can take action by self-auditing I-9 forms to ensure compliance with the law and, in doing so, may avoid potential liability if ever audited by ICE. Please note that although employers can identify and correct some common I-9 violations, proper correction of errors is imperative, and some errors cannot be remedied.

Storage of I-9s: There is no legal requirement that I-9s be stored separately from the employment file; however, there are a few good reasons to do so. You will only have three business days after receiving a Notice of Inspection from ICE to gather necessary documentation. Storing I-9s together, with current employees separated from former employees, allows for quick access to facilitate an inspection request and will also allow for an efficient self-audit to ensure that all forms are accounted for and completed properly. Also, there is no reason to expose your organization to additional scrutiny and additional potential violations by providing ICE access to personnel files. Further, to avoid potential discrimination charges, it is advisable to exclude information related to race, ethnicity, perceived national origin and other protective characteristics from personnel files. Finally, as I-9s contain personal information about employees, it is recommended that employers provide adequate safeguards to protect employee information when storing these forms.

Inspection of I-9s: When auditing I-9s, start off by comparing a payroll roster of current and former employees with the I-9 files and note any missing forms. Each form should be reviewed individually for errors and incompleteness, for discrepancies between completion dates and hire dates, and for unacceptable verification documents. Employers are not required to copy employees' documentation, but if they elect to do so, copies should be retained consistently for all employees. If documents were not copied and it is the company's policy to maintain copies, try to obtain copies from employees at this time. If too many documents were copied, there is no remedy. Do not destroy document copies that were retained with the original I-9 unless the retention period has passed. A list should be made to account for missing I-9s, necessary re-verification and those forms requiring correction. Common

errors found on I-9s include missing dates and addresses, the employee's failure to complete attestation, the employer's failure to complete I-9 certification, information recorded in the wrong place, I-9s not signed and dated within the time limits, inconsistent copying and retention of supporting documents, accepting expired documents and incorrectly altered documents.

Correction of I-9s: Employers may only correct errors made in Section 2 or Section 3 of the I-9. The same representative of the employer who originally signed Section 2 should make corrections, as this was the person who reviewed the original documents and attested to having done so under penalty of perjury. If the original reviewer no longer works for the employer, it is advisable to complete a new I-9 and attach it to the original form. If an error is discovered in Section 1, the employee should be asked to correct the error. For each type of error that is discovered, there is a proper way to make the necessary correction. If the error is technical, such as misspelling or transposition of digits, simply draw a line through the incorrect information and write the correct information above in a different ink color. Do not erase, use correction fluid or black out the error. Date and initial the changes with the current date; never backdate any corrections. To make multiple changes, you may redo the section on a new I-9 and attach it to the old form. A new I-9 can be completed if major errors (e.g., if entire sections are left blank or Section 2 is completed based on unacceptable documents) need to be corrected. Make sure a new I-9 is necessary before asking an employee to complete one a second time to avoid any appearance of document abuse. A simple audit memo should be attached to the corrected I-9 explaining the reason for the changes, the date the correction was made and the fact that the correction was made during a self-audit before any notice of inspection was served. Do not destroy the old I-9, and be sure not to conceal any changes made on the form, as doing so may lead to increased liability. If you have several forms needing corrections, consider preparing a summary of all changes in a table or chart format that indicates what was corrected and why.

Improper destruction of I-9s: When I-9s are improperly destroyed or lost, even accidentally, this is considered a substantive violation and there is no remedy. However, it is possible to mitigate the damage by having the affected employee complete a new I-9 as soon as possible, making sure to date the form correctly (do not backdate). Attach a short memo to the new I-9 explaining the reason for the destroyed or lost I-9 and the steps taken to correct the error. While this will not completely remedy the error, it will show a good faith effort toward compliance, which should be considered if fines are assessed by ICE.

Self-audits should be done fairly and consistently. Do not selectively audit certain employees; rather, review all forms with the same level of scrutiny. The record of audit results will assist in identifying specific problems in your company's creation and retention of I-9s, if any. Such results can be used to create or revise procedures to ensure accuracy and compliance with the law. Do not wait for ICE to show up to correct I-9 mistakes. Being proactive and conducting a self-audit of your organization's documentation practices demonstrates good faith and should lessen any penalties your business may face if subjected to a "silent raid."

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