

The Anatomy of an I-9 Audit

Presenters:

Jen Cornell, Nilan Johnson Lewis

Loan T. Huynh, Fredrikson & Byron PA

John Medeiros, Myers Thompson PA

Presentation Overview

- Brief overview of I-9 Form
- Essential Elements of an I-9 Compliance Program
- Conducting I-9 Self Audits
 - How to fix I-9 mistakes
 - Fines and how to avoid them when mistakes exist
 - What is E-Verify?
- Government Audits
 - NOIs, NOSDs, NIFs, etc...
 - Assessing Fines
 - Mitigating damages

Overview of the Form I-9

- Employer Sanctions and IRCA
 - Establish identity and employment authorization of new hires
- Three sections to the I-9 form
 - **SECTION 1: EMPLOYEE**
 - Employee must complete on first date of employment (when starts employment in exchange for wages or remuneration).
 - May complete before date of hire by not before acceptance of the job offer.

Overview of the Form I-9 continued...

– **SECTION 2: EMPLOYER**

- Employer must review Section 2 within three business days of the day of hire.
- Employee must present original document(s) to show identity and employment authorization from pre-determined list of acceptable documents.
- Person who examines documents must be the same person who attests and signs Section 2.

– **SECTION 3: EMPLOYER**

- Employer completes section 3 in the case of a rehire or reverification, recording legal name change, or update previously expired employment authorization.

Essential Elements of an I-9 Compliance Program

- **Who?** - Delegate central responsible party or parties
- **What?** - Establish compliance procedures, steps to ensure compliance actions, and explanation of potential fines and penalties
- **When?** - Outline timeframes for completing required documentation and trainings, and for performing internal audits
- **Where?** - Explain where and how documents are to be retained
- **How long?** - Communicate how long documents must be retained

Conducting I-9 Self Audits

- Self-audits allow you to review what a government agency could demand to see with more time to correct errors
- Allow for more time
- Can help reduce the number of violations
- Can help identify questionable documents
- Can help establish a good faith defense that reduces liability

Government Agencies in I-9 Enforcement

I-9 compliance is enforced by the DHS through the Immigration and Customs Enforcement division, but any of the above agencies can request access to an employer's I-9 forms and/or report issues.

- Department of Homeland Security's ("DHS") Citizenship- United States Citizenship & Immigration Services
- Immigration Services and Immigration and Customs Enforcement – Homeland Security Investigations ("HSI")
- Department of Justice's Immigrant and Employee Rights Section
- Department of Labor's Federal Contract Compliance Programs and Wage and Hour Division.

Fines

- Fines increased in August 2016
 - A **paperwork** violation per deficient I-9
 - First offender fines used to range from \$110 to \$935
 - Now extend from \$216 to \$2,156

Fines (cont'd)

- Fines for **allowing unauthorized persons to work** also increased:
 - First offender fines used to range between \$375 and \$3,200 per individual
 - Now they will extend from \$539 to \$4,313

Fines (cont'd)

Per I-9 fines can be increased by 5% for each of the following factors:

- The size of the business
- Good faith effort to comply
- The seriousness of the violation
- Whether the violation involved unauthorized workers
- The history of previous violations

Fines (cont'd)

- In 2015, Hartmann Studios in Richmond, California was ordered to pay \$605,250 for I-9 compliance violations found in more than 800 I-9s, including:
 - 797 that were missing Section 2 or it was unsigned
 - 8 forms for employees that could not be located, and
 - 7 forms where the employee made an error in Section 1
- \$564,205 of the fine was for paperwork violations alone.
- Under the increased fine schedule, the fines would have exceeded \$1 million

Common Mistakes

Section 1

- Employee leaves a section blank
- Expiration date not noted when work authorization status is valid until a specific date

Common Mistakes (cont'd)

Section 2

- Having Employee complete Section 2
- Asking Employee for specific documents
- Requiring Employee to show “Green Card”
- Not listing date employment began
- Not signing and dating Section 2

Keys to Remediation

- Establish a plan to remediate including determining if you are missing any I9s
- Section 1 errors must be corrected by the employee
- Section 2 errors can be fixed by any agent of the employer
- Use red ink for corrections
- Sign and date every correction, including by the employee
- Do not back date
- Do not use white out or overly cross out – make sure the error can be seen

What is E-Verify?

- **What is E-Verify?**

- Internet-based system that compares information from your Form I-9 to Department of Homeland Security (DHS), Social Security Administration (SSA), and Department of State (DOS) records to confirm that a worker is authorized to work in the United States

- **How does E-Verify reporting differ from I-9 obligation?**

- It is voluntary for most employers
- Once an employer joins, it must be completed for all employees

What is E-Verify (cont.)

- It is not a substitute for Form I-9
- Voluntary participation in E-Verify does not obviate any of an employer's responsibilities under the IRCA.
- E-Verify must be started before the end of the third day of employment, consistent with the employer's timing obligations for completing Section 2 of the I-9.

I-9 and E-Verify

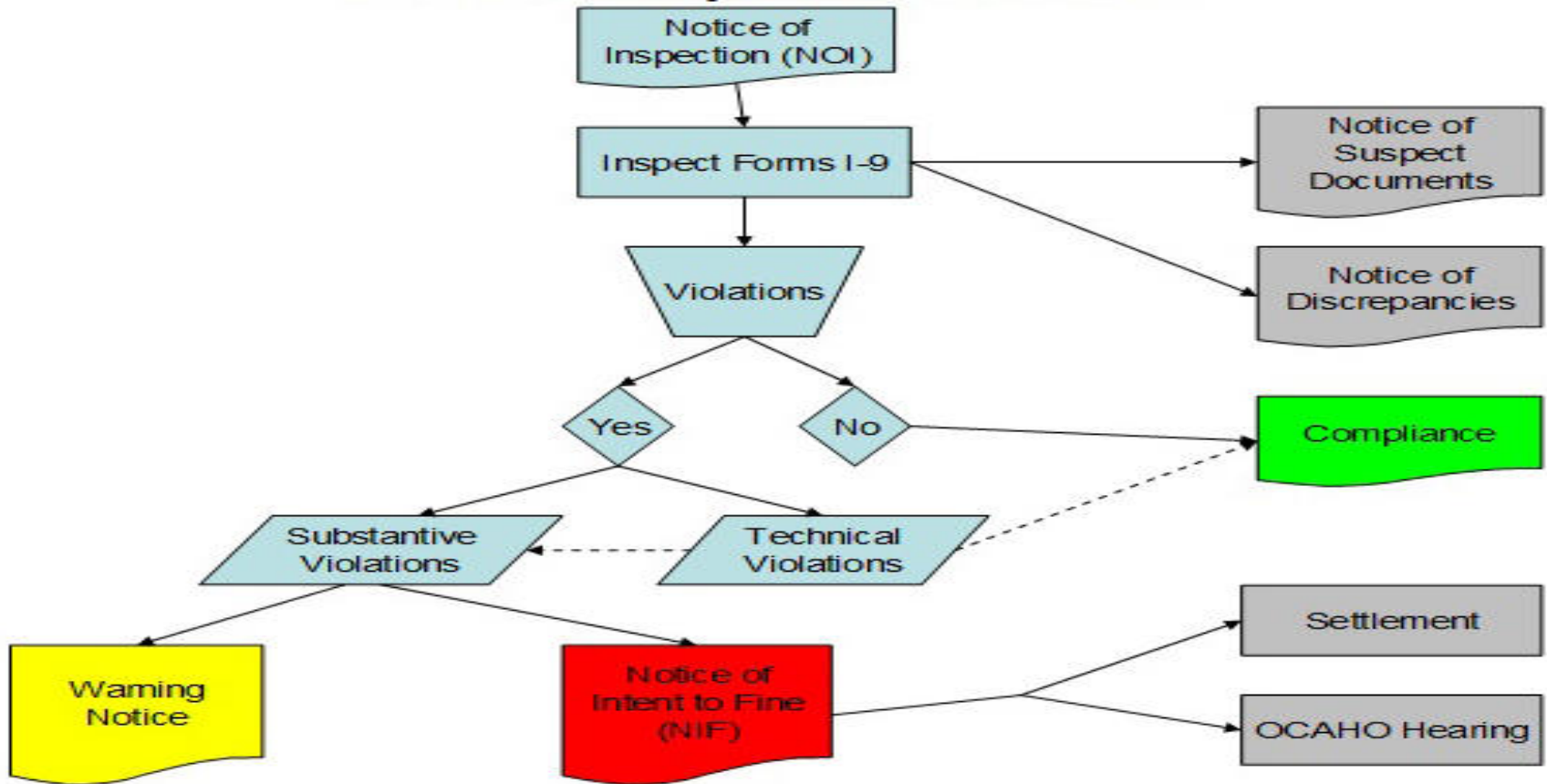
Form I-9	E-Verify
Is mandatory	Is voluntary for most employers
Does not require employee's Social Security number	Requires employee's Social Security number*
Does not require a photo on identity documents (List B)	Requires a photo on identity documents (List B)
Must be used to reverify expired employment authorization	May not be used to reverify expired employment authorization

E-Verify Audit Triggers

- Enhanced “data analytics” allow DHS to monitor usage and identify questionable practices:
 - Creating duplicate cases for the same employee;
 - Immediately terminating employees who receive a tentative non-confirmation (TNC);
 - Failing to create a case by the third day after the employee started work for pay;
 - Creating cases for employees who were hired before the E-Verify participant enrolled in E-Verify;
 - Failure to print the Further Action Notice when a new hire receives a TNC;or
 - Requesting specific documents from employees.
- The Monitoring and Compliance (M&C) branch may refer cases of suspected misuse, abuse, and/or fraud to Immigration and Customs Enforcement or the Immigrant and Employee Rights Section.

The I-9 Audit : An Overview

Form I-9 Inspection Process



Notice of Inspection

- Homeland Security Investigation issues the Notice of Inspection (NOI) to request Form I-9s along with a Subpoena for Certain Documents
- Sent via US mail or delivered in person
- Provides the Employer three business days to present the I-9s for all current employees (may also request I-9s for terminated employees)

Notice of Inspection, cont.

- HSI or other government entity can also issue warrant or subpoena for I-9
- Subpoena with NOI can request: payroll records, corporate documents, names of owners/shareholders, tax I.D. number, contracts with contractors/subcontractors, tax record, and/or SS no match letters

Tips for Responding to Notice of Inspection

- Obtain legal counsel before responding
- Use the three business days wisely
- Make copies of all documents provided to HSI, especially I-9s
- Include supporting documentation if copies were made.
- Provide an I-9 for all current employees even if untimely

Notice of Suspect Documents

- List of employees who are not authorized to work in US
- Employer must verify work authorization or take action within 10 business days to establish reasonable care
- Avoid discriminatory action when following up
- Provide employee and employee opportunity to contest HSI's determination

Notice of Discrepancies

- HSI is unable to determine employee's documents established work eligibility
- Provide copy of notice to employee
- Provide employee opportunity to present additional evidence

Notice of Technical/Procedural Failures

- Paperwork violations
- Employer has 10 days business day to make corrections
- Copies of supporting documents matter
- Example: Expiration date on driver's license is not listed under List B
- Example: Issuing authority missing

Warning Notice or Notice of Intent to Fine (NIF)

- **Warning Notice:** Violations existed but no monetary fine
- **Notice of Intent to Fine (NIF)** – Fines for substantive, uncorrected technical, knowingly hire and continuing to employ violations.

Notice of Intent to Fine

- 30 days to request OCAHO hearing
- Provides list of violations
- Knowingly hire/continuing to employ violations
- Substantive/uncorrected technical violations

I-9 Fines: Mitigating and Aggravating Factors

- January 2017 - updated fines
- <https://www.ice.gov/factsheets/i9-inspection>
- Five Factors: Business Size, Good Faith, Seriousness, and Unauthorized Employees

Request for Hearing/The Settlement

- ICE-Office of Chief Counsel
- Discretion based on following considerations: business size, good faith, seriousness, unauthorized aliens, and history

Questions?

