Are You Ready for an I-9 Audit or an ICE Raid?

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WHAT WE WILL COVER

- Increased I-9 Scrutiny
- I-9 Basics
- Correcting I-9s
- Electronic Storage of I-9s
- I-9 Best Practices
- Ground Rules for an ICE Audit or Raid
INCREASED I-9 SCRUTINY
ENFORCEMENT THROUGH ICE WORKSITE AUDITS

- In 2014, ICE conducted 1,320 worksite audits, resulting in more than $8.5 million in fines and 172 employer arrests
- As for the size of the employers, more than half were small - under 100 employees
ENFORCEMENT THROUGH ICE WORKSITE AUDITS

- Industries targeted for inspection by ICE (recent cases reported by OCAHO)
  - Construction
  - Hospitality
  - Food Preparation/Manufacturing
  - Health Care
  - Retail
PENALTIES FOR I-9 VIOLATIONS

- I-9 paperwork violations – civil penalty of $110 to $1,100 per violation
- I-9 document abuse (asking for more documents than required) – civil penalty of $375 to $3,200 per violation
- Knowingly hiring or continuing to employ a person not authorized to work in the US – civil penalty of $275 to $2,200 per violation, for the first offense
- Knowingly engaging in a pattern or practice of hiring or continuing to employ persons unauthorized to work – criminal penalty of $3,200+ per violation and up to 6 months imprisonment
PREVENTING COMPANY LIABILITY

- Train Human Resources Managers or other individuals responsible for completing the Form I-9 on how to properly complete the form
- Consider developing a comprehensive I-9 policy
- Periodically audit I-9s (internally or by using outside counsel) and correct any mistakes
I-9 BASICS
I-9 BASICS

I-9s Are Required For Every Employee

- Employers must have one for all employees hired since November 7, 1986

- An I-9 is NOT required for
  - Employees hired before November 6, 1986
  - Independent contractors
  - Individuals not physically working on U.S. soil
I-9 BASICS

- Must use new two page I-9 form as of May 7, 2013
  - Two page form can be stored double sided or as two pages
  - Two new fields – employee email and phone number (optional)
  - Form states “the instructions must be available during completion of this form
- Employee completes section 1 on or before first day of hire
- Employer has three business days, after the day of hire, to complete section 2 and examine original documents (four day rule)
- Employer, or its agent, reviews original documents and completes Section 2
- Must not hire persons who lack valid work authorization
- Cannot use a subcontractor relationship (staffing company or independent contractor) to hire someone you have reason to believe is not work authorized
A FAIRLY COMPLEX LITTLE FORM

70 pages… for a… two page form
FILLING OUT THE I-9 – SECTION 1

Every new hire must fill out Section 1 himself/herself – handwritten is OK

Avoid typing Section 1 for the employee – if do, then should complete translator certification as the employee was assisted in the process

Email, telephone, and SSN are optional

Common errors include date of birth matching today’s date

“N/A” is preferred in any open boxes
FILLING OUT THE I-9 – SECTION 1 (CONT.)

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.

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

☐ A citizen of the United States
☐ A noncitizen national of the United States (See instructions)
☐ A lawful permanent resident (Alien Registration Number/USCIS Number): ____________________________
☒ An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) 02/28/2015. Some aliens may write “N/A” in this field. (See instructions)

For aliens authorized to work, provide your Alien Registration Number/USCIS Number OR Form I-94 Admission Number:

1. Alien Registration Number/USCIS Number: 1 2 3 4 5 6 7 8 9

OR

2. Form I-94 Admission Number: ____________________________

If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:

Foreign Passport Number: ____________________________

Country of Issuance: ____________________________

Some aliens may write “N/A” on the Foreign Passport Number and Country of Issuance fields. (See instructions)

- Employee selects his/her status, but HR can provide guidance – “green card holders” are not Aliens Authorized to Work, for example
FILLING OUT THE I-9 – SECTION 1 (CONT.)

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2. Form I-94 Admission Number: ___________________________

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Foreign Passport Number: ___________________________

Country of Issuance: ___________________________

Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. (See instructions)

- Make sure lawful permanent residents ("green card holders") include either their A Number, or the USCIS number on their status
FILLING OUT THE I-9 – SECTION 1 (CONT.)

- Employees must sign and date the I-9
- Watch out for employees including their date of birth in the date section next to their signature, which is an error
- If you assist the employee in preparing the I-9, like typing up the form with their information, or writing on the form because they have a disability, be sure to complete the translator section
- ICE Officers looks for handwriting differences between Sections 1 and 2
FILLING OUT THE I-9 – SECTION 2

- Let the employee select what they want to use – List A OR List B and List C documents
- If presented with many different documents by the employee, be sure not to fill out List A, B and C
- Can copy and attach only the documents used to complete the I-9, not all docs received
I-9 DOCUMENTATION – IS IT GENUINE?

- Employer reviews new hires’ original documents to ensure they “reasonably appear on their face to be genuine and they relate to the person presenting them”
- Must not over document or discriminate during the I-9 process

- Over documentation
  - Generally – if attach documentation for one then MUST do it for all
  - NEVER request specific documents from an employee – he/she must decide what can/will provide

- Discrimination
  - Most litigation in the I-9 arena had been where employers use the I-9 to exclude workers who are eligible for employment – national origin discrimination
  - Employers are only required to review original documents for obvious forgeries, since most employers do not know what a bona fide document looks like; color copies of many acceptable documents – ICE Handbook
USING AGENTS

- How To Use Agents For Remote Hires
  - Who completes Section 2? “Employer”
  - Can be an agent of the employer - - sister company, onsite customer, notary public, or any unrelated neutral 3rd party
  - Person completing Section 2 must be the individual who examined the original documents from the employee
  - M-274 confirms that the employer is “still liable for any violations in connection with the form or the verification process”
  - On the I-9 - e.g. Fred Smith, Agent of ABC company, and HQ address
FILLING OUT THE I-9 – RE-VERIFICATION

Re-verification is needed whenever the work status of an alien who is authorized to work will expire – on or before status expires (unless outside the US)

- All re-verification must be done on the latest version of the I-9 form
- US citizens and LPRs generally won’t need re-verification
- This section should also be used when a name change has occurred
- See the M-274 handbook for the rules regarding rehires
CORRECTING AN I-9
HOW TO CORRECT AN I-9

- Only the employee can correct Section 1 of the I-9
- Any employee of the company can edit Section 2 of the I-9, as long as he/she can reasonably attest to the information
- Always use a different colored pen, and initial and date next to each change
- If the information is correct, but simply in the wrong location, draw an arrow to the proper location and initial and date the change
- If unsure how to correct an I-9, can complete a new I-9
- If you are missing an I-9 for an employee, complete one immediately. Insert the actual date completed, do not back date
- Consider whether to attach a memo to the corrected I-9 explaining the purpose of the correction

Helpful resource: [www.uscis.gov/i-9-central](http://www.uscis.gov/i-9-central)
CORRECTING I-9S - EXAMPLE

Section 1: Employee Information and Attestation (Employees must complete and sign Section 1 of Form I-9 to later than the first day of employment, but not before accepting a position.)

Last Name (Family Name): Auxier
First Name (Given Name): Christine
Middle Initial: N
Other Names Used (if any):

Address (Street Number and Name): 5315 E Allen Rd
Apt. Number: 
City or Town: Howell
State: MI
Zip Code: 48855

Date of Birth (mm/dd/yyyy): 1/2/1975
U.S. Social Security Number: 377-15-9179
E-mail Address: cnauxier@oakland.edu
Telephone Number: 517-552-3043

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

☑ A citizen of the United States
☐ A noncitizen national of the United States (See instructions)
☐ A lawful permanent resident (Alien Registration Number/USCIS Number):

☐ An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) ___________ Some aliens may write "N/A" in this field.
(See Instructions)

For aliens authorized to work, provide your Alien Registration Number/USCIS Number OR Form I-94 Admission Number:

1. Alien Registration Number/USCIS Number: __________________

   OR

2. Form I-94 Admission Number: __________________

If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:

Foreign Passport Number: __________________
Country of Issuance: __________________

Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. (See instructions)

Signature of Employee: Christine Auxier
Date (mm/dd/yyyy): 6/9/14
DESTROY LEGACY I-9S

- An employer can (and should) destroy I-9s of former employees – three years after date of hire or one year after employment ends – whichever is longer
ELECTRONIC I-9S
ELECTRONIC STORAGE OF I-9S

- You can store I-9s electronically, but need controls for the integrity, accuracy and reliability for the storage system including
  - Controls for preventing tampering or unauthorized access
  - Accidental altering and/or deterioration of the stored I-9s
  - Inspection and quality assurance procedures
  - A retrieval system that includes indexing capabilities
  - The ability to print paper copies
  - Protect against information loss and to provide for backup
  - Employees must be trained in the security system
  - When reviewing I-9s, a permanent record must be created to identity of the person who accessed the record

- Need to be able to document the entire system – third party software provider the best idea
GROUND RULES FOR ICE AUDIT / RAID
ICE INSPECTION PROCESS

Form I-9 Inspection Process

Notice of Inspection (NOI)

Inspect Forms I-9

Violations

Yes

Substantive Violations

Warning Notice

No

Technical Violations

Notice of Intent to Fine (NIF)

Notice of Suspect Documents

Notice of Discrepancies

Compliance

Settlement

OCAHO Hearing
BASIC I-9 AUDIT GROUND RULES

- Below are some basic ground rules in the event of an I-9 audit
  - The ICE letter will give you three business days to prepare for ICE officers to come to your office and pick up the original I-9s. ICE may contact you prior to the letter by phone to set up the timing of the inspection
  - ICE may give you a small extension for some of the information that is needed (payroll records)
  - Can you review your I-9s, and make copies so they can take the originals, in three days? Are your people trained to do it?
  - Do not destroy any documents, including attachments, old I-9s, or any company records
  - Hire counsel
BASIC ICE RAID GROUND RULES

- Below are some basic ground rules in the event of an ICE raid
  - When the officer arrives, you may ask to see a warrant
  - Never obstruct, be polite, smile
  - Does your Receptionist (or branch employees) know what to do?
  - Do not destroy any company documents
  - Hiring local counsel is critical. Hiring criminal counsel may be necessary
THANK YOU!

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LEGAL DISCLAIMER

NOTE: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.